Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
COUNCILMAN SIDNEY LANTZ—PETITIONER

Vs.

NANCY BANKS, IN HER OFFICIAL CAPACITY
AS CLERK FOR THE CITY OF SOUTHFIELD----
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

STEPHEN P. KORN
COUNSEL OF RECORD FOR PETITIONER
STEPHEN P. KORN & ASSOCIATES PLC
30800 VAN DYKE SUITE 206
WARREN, MICHIGAN 48093
810-751-1696

43pp

QUESTIONS PRESENTED FOR REVIEW

1) WHETHER THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN DENYING COUNCILMAN LANTZ'S APPLICATION FOR LEAVE TO APPEAL?

2) WHETHER THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DISMISSAL ENTERED IN THE TRIAL COURT OF COUNCILMAN LANTZ'S COMPLAINT FOR REVIEW OF THE DISPUTED ELECTION OF NOVEMBER 2, 1999, WITHOUT DUE PROCESS OF LAW?

3) WHETHER THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DECISION OF THE TRIAL COURT TO DENY COUNCILMAN LANTZ DISCOVERY PURSUANT TO MICHIGAN COURT RULE RELATIVE TO THE DISPUTED ELECTION OF NOVEMBER 2, 1999, DENYING THE APPELLANT DUE PROCESS OF LAW?

Introductory Statement:

A municipal election was decided by seventy votes. The morning after the election, one hundred eighty unopened, uncounted absentee ballots were discovered. Thirty eight

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additional absentee ballots were discovered. One Thousand One Hundred Forty Three absentee ballots remain unaccounted for. In her trial court answer, the Clerk refused to admit or deny the existence of the ballots, and refused to produce them, if she had them. The Trial Court dismissed the case and refused to permit any discovery under Michigan Court Rule. The Trial Court invented a version of facts without evidence or testimony. There was no Trial. The Court of Appeals affirmed. The State Supreme Court declined review. After the passage of twenty three months since November 2, 1999, the disputed ballots have not been produced for review. The Clerk has not had to answer one question under oath as to the whereabouts of the disputed ballots.

The failures of the Michigan State Courts to provide a forum to review this disputed election give rise to the questions of this Appeal. The doors to the Courthouses should be open for fair, and meaningful review. The integrity of our Elections is compromised if there is no "Due Process" available to review a disputed election in State Court.

The importance in maintaining the integrity of our State elections was never clearer than the 2000 Federal elections when State election officials were involved in insuring the integrity of the vote for the office of President of the United States. When a local Clerk can discriminate in the counting of ballots, and particularly, the absentee ballots, on the basis of race, sex, age, or ethnicity, there must be some forum to fairly review this process.

Councilman Lantz is a senior citizen. The absentee ballots in dispute are a core of his constituency. The failure to count these ballots; the failure for the Courts to compel the production of the disputed absentee ballots for independent inspection and review give rise to the questions raised for this appeal.

Whether the doors to the Courthouses are open for the "consumers" of justice in disputes arising from the failure to count

ballots in an election, reflect on the integrity of the Election Process itself. The failure to provide any forum for meaningful, review, reflect on the failure of our laws, or the failure of the Court system.

The doors to this Court are open to the rich and powerful. Appellant is a senior citizen, City Councilman, who brings this fight to preserve American Democracy on the salary of his Social Security and the few dollars of his wage for City Council participation. Democracy works if all of the ballots that should be counted are counted in a given election. If there is no forum to review an election dispute in a State, of these United States, that State violates Due Process of Law, and violates the underlying premise of American Democracy. If a Clerk can refuse to admit or deny the existence of ballots, and refuse to produce them, if she has them; and implicitly be allowed by Government to discriminate on the basis of age, race, ethnicity, or sex,; with no independent review of the election process in a Court of law, it is a matter for the Supreme Court. Tens of thousands of people are effected. In a Democracy, it may not matter which candidate in a particular election prevails over the course of time; but how and whether the votes are counted is of paramount importance.

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Order of the Michigan Court of Appeals entered May 8, 2001
No cite available according to the Clerk of the Court

STATEMENT OF JURISDICTION

On August 28, 2001, the Supreme Court of Michigan, the state's highest state court, issued the opinion which gives rise to this appeal. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCR 2.302(B)(1):

"(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

STATEMENT OF THE CASE

This appeal is taken from a Judgment of the Supreme Court of the State of Michigan, which declined review of this case on August 28, 2001. Appeal to the Supreme Court of Michigan was taken from a Judgment of the Michigan Court of Appeals dated May 8, 2001 affirming summary disposition in favor of the Defendant/City Clerk. The State Appellate Court determined that there was no genuine issue of a material fact. The State Appellate Court determined that there was no right to discovery in this disputed election case.

This case involves a 1999 local election where the outcome of the election was decided by seventy votes. The day after the election, it was discovered that over one hundred eighty absentee ballots were unopened and uncounted. Thirty Eight additional absentee ballots were later discovered unopened and uncounted. Over o thousand one hundred forty three absentee ballots remain unaccounted for.

"There is no disputer about the law." Michigan law provides that the absentee ballots have to be in the Clerk's possession at the time the polls close to be counted."

What is in dispute are matters of fact:

1) Were the one hundred eighty absentee ballots discovered the morning after the election in the hands of the Clerk prior to the close of the polls?

2) Should those disputed ballots have been counted?

3) Would counting the disputed ballots alter the outcome of the subject election?

4) Where are the 1,143 ballots which remain unaccounted for?

5) Were any of those disputed ballots in the hands of the clerk prior to the close of the polls?

6) Should those disputed ballots have been counted? And lastely:

7) Would counting of these disputed ballots alter the outcome of the subject election?

The Trial Court, the Appellate Court, and the Michigan State Supreme Court have refused pre-trial discovery. There were no interrogatory answers. There were no depositions. There was no trial. There were no witnesses. There was no evidence or vehicle to produce evidence before the Court. The ballots were never produced for an objective review to determine whether they were received by the Clerk prior to the close of the polls and proper for counting.

The Trial Court heard argument on February 9, 2000. The Clerk "neither would admit nor deny the existence of the ballots" according to the answer filed in her behalf; and refused to produce the ballots if she had them." On February 18, 2000, the Trial Judge issued an opinion, upholding the position of the Clerk.

Whether the Defendant/Clerk had the disputed ballots in its possession at the time the polls closed election day or not, will never be determined on a silent record. Absent the testimony of City workers, election workers, postal workers and a review of the disputed ballots, the truth about the election's outcome will never be known.

An election should be won or lost based on the number of votes

received by the candidates. This case should have been won or lost based on facts and evidence before the Court.

Absentee ballots are often utilized by senior citizens and those sick or disabled. They are often tabulated after the counting of the machine votes in local districts. If there is no judicial forum to challenge the counting of ballots in an election, Clerks will be accountable to no one. Any Clerk would be left to determine the outcome of an election by stopping the ballot count when one candidate or another pulled ahead.

Senior citizens have no rights to vote if their ballots are not counted. The public is denied honest government and free elections if there is not a fair process for counting the ballots and a mechanism to resolve disputed elections.

A clerk "who neither admits nor denies the existence of ballots" is suspect. A clerk "who refuses to produce ballots" if she has them, is suspect. Public confidence in the integrity of our elections and our judicial process warrant this Court's consideration.

In November, 2000, the country paid attention to the Presidential election. It was a study in politics; a study in law. The election cases moved through the counties of Florida and up and down the appellate tier. The Supreme Court of Florida became involved. Ultimately, the Supreme Court of the United States became involved.

While some in America dispute the outcome of the November, 2000 Presidential election, no one can dispute the fact that the legal process rose to meet the challenges in the State of Florida. It is a lot to ask of any state court system to address the multitude of election cases in the time frame of weeks....and yet, if called upon, that is exactly what could and did happen.

Citizens of the United States take voting seriously. We vote candidates in. We vote candidates out. We protect senior citizens voting rights and the voting rights of those sick and disabled by

offering the right to vote by absentee ballot.

This 1999 election is disputed. Thousands of citizens are effected. Ballots are in dispute. It is important for the public to know that our elections are honest. It is important for the public to know that there is a forum to bring election disputes which will resolve election conflicts in a fair and timely manner. In 23 months, there has not been one evidentiary hearing. In 23 months, there has not been a period of discovery.

When hundreds of absentee ballots are disputed and identified as uncounted; and perhaps, a thousand more such ballots remain unaccounted for, the matter should be addressed by the Courts, upon proper application. The arbitrary denial of all discovery undermines public confidence in the judicial process. The failure to consider ballots, evidence, or testimony from witnesses undermines public confidence in the judicial process. The failure to conduct a trial to determine the truth of allegations in a disputed election undermines public confidence in the judicial process.

The failure to protect the rights of senior citizens who vote by absentee ballot undermines public confidence in the integrity of our elections and democracy itself. The failure to protect the rights of those sick and disabled who vote by absentee ballot undermines public confidence in the integrity of our elections and democracy itself.

The issues before the Court have significant public interest. The case is one by a City Councilman against a City Clerk performing in her official governmental capacity. The issues involving the counting of absentee voter ballots involve legal principles and rights which are of major significance to the state's jurisprudence.

The public has a right to rely upon our Courts to resolve this public dispute. Due Process and respect for fairness should be considered a premium. If absentee ballots are not to be counted and accounted for, let it not be because of a denial of discovery;

denial of evidence; denial of witnesses; denial of a Trial. If absentee ballots are not to be counted and accounted for, let it be because they should not be counted for proper reasons.

This application is an opportunity for our Supreme Court to right the wrongs of Due Process and Fairness. The seniors and those sick and disabled who vote by absentee ballots deserve this consideration. The public deserves this consideration as it is the public who cast their collective votes. Let the review of this election be fair and open. To do otherwise compromises the integrity of our Democratic Process, and the integrity of our judicial process.

If the doors of Justice are closed at the highest levels of our judicial system to review the process by which Elections themselves are reviewed, there will be no meaningful way to insure that the government officials counting ballots in a given election do not discriminate in the counting of such ballots based on race, age, sex, or ethnicity.

Appellant brings this last appeal to this Court.

ARGUMENT FOR ALLOWANCE OF THE WRIT

If we have nothing else in America, we live in freedom. We purport to live in freedom. We purport to live in a Democracy. We purport to have elections for our governmental officials to be certain that the will of the people speak through the voice of the majority vote.

When a Clerk submits a pleading to the Trial Court "neither admitting nor denying the existence of ballots, and refusing to produce them if she has them," there is a problem with Democracy. When a Clerk can manipulate the outcome of any election by choosing to count or ignore ballots without any independent check on that process, such a Clerk can determine the outcome of any election. When a Clerk's conduct in the counting of ballots is not subject to review, a Clerk could discriminate in the counting of ballots based on race, age, sex, or ethnicity.

The threat to Democracy is not only from outsiders who would destroy Democratic institutions. The threat to Democracy comes from within when our Judicial system turns the other cheek with indifference to election controversies without regard to the consequences of this course.

In the case at bar, the Trial Court closed the door on discovery. The Trial Court allowed the Clerk to "neither admit nor deny the existence of the disputed ballots and refuse to produce them if she had them." The Trial Court protected this Clerk from answering one question under oath.

There was no trial in the Trial Court. There was no testimony taken of the Clerk, election workers, or postal workers. There was no evidence admitted into the record. The ballots were never made part of the record.

The Trial Court made findings which were unfounded, to put it politely. The integrity of the subject election as compromised.

The doors to the Courthouse were closed. The Court of Appeals did nothing to right the injustice. The Appellate Court approved the findings of the Trial Court eighteen months after the subject election, with four months until the primary election for the next vote. Short of four months thereafter, the State Supreme Court declined to review this matter, with two weeks to go before the primary election. The general election is November 6, 2001. The period of time available to review the most elections is seven to eight weeks where the vote takes place in November, and the winner takes office in the forthcoming January.

Councilman Lantz will have served a two year term from January, 2000 through December, 2001. The voters may well have given Councilman Lantz a four year term....but, without a Court willing to allow discovery to compel the production of the ballots; and without a Court willing to allow the taking of testimony; and without a Court willing to allow the admission of evidence; one will never know the outcome of this election...or for that matter, any election hereinafter.

Democracy does not work unless one is willing to count the votes honestly. The Judicial System does not work unless Courts are willing to apply due process of law to such proceedings. This is not a difficult case. The Writ of Certiorari should be granted to let the word go forth that the doors to the Courthouses in the United States are open to resolve election disputes in accordance with Due Process.

When many thousands of people take the time to vote, their expression of will should not be compromised by the failure to count certain ballots. No Clerk should be allowed to manipulate the outcome of any election, nor should any Clerk be allowed to discriminate in the counting of ballots on the basis of race, age, sex, or ethnicity.

The Writ of Certiorari should be granted and the matter set for an expeditious hearing to protect our Democratic process, and the integrity of the judicial process in the review of a disputed election. Most elections in the United States are for positions other than President of the United States. We must protect the integrity for these elections.

The following specific arguments are presented in support of the Petition for Writ of Certiorari:

Argument I: The Supreme Court for the State of Michigan violated the 14th Amendment to the United States Constitution in denying Councilman Lantz's Application for Leave to Appeal.

Argument II: The Supreme Court for the State of Michigan violated the 14th Amendment to the United States Constitution in failing to reverse the decision of the Michigan Court of Appeals which affirmed the dismissal by the Trial Court of Councilman Lantz's Complaint for review of the disputed election of November 2, 1999, without due process of law.

Argument III: The Supreme Court for the State of Michigan violated the 14th Amendment to the United States Constitution in failing to reverse the decision of the Michigan Court of Appeals which affirmed the decision of the Trial Court to deny Councilman Lantz discovery pursuant to Michigan Court Rule relative to the disputed election of November 2, 1999, denying the Appellant due process of law.

The arguments are set forth, as follows:

ARGUMENT I

THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION IN DENYING COUNCILMAN LANTZ'S APPLICATION FOR LEAVE TO APPEAL.

The Supreme Court for the State of Michigan is the highest Court in the state. This Court declined to review an election dispute involving many thousands of its citizens who participated in an election on November 2, 1999. The population of Southfield, Michigan, involving tens of thousands of people would have to live with the results of the election, although, a dispute arose about the election's outcome.

After 23 months, there has been no trial; there has been no taking of testimony; there has been no discovery permitted; there has been no evidence admitted; and more to the point, disputed ballots have not been produced for inspection and review. There are findings of fact by the Trial court which are erroneous, and without foundation.

The Fourteenth Amendment to the United States Constitution sets forth "DUE PROCESS" and "EQUAL PROTECTION OF THE LAWS." Fundamental fairness and equal treatment under the law have been the hallmarks of the United States of America's jurisprudence....that is.....when the doors to the Court houses are open.

When it takes 23 months to go nowhere in a case; where no depositions are permitted; no interrogatories permitted; no evidence permitted; no ballots produced or review permitted; no testimony of any witnesses permitted; no trial before a trier of fact; appellate review which directs no remand to the Trial Court permitted; and no review by the State's high court permitted....the

doors to the Courthouses are closed.

When the election process appears flawed requiring an independent and responsible review, there appears to be none available in the State of Michigan. There is a plethora of cases which speak to what is meant by due process of law under the Fourteenth Amendment to the United States Constitution. One such view is set forth:

"Concededly, a "fair trial" in a fair tribunal is a basic requirement of due process." Withrow v. Larkin, 421 US 35, at 46, (1975); In Re Murchison, 349 US 133, at 136, (1955).

The facts in the case at bar, are glaring. The outcome of the November 2, 1999 election may well have been determined by a Clerk who would neither admit nor deny the existence of the ballots, and refused to produce them if she had them. This Clerk destroyed election materials relative to this election, and has not had to answer one question under oath.

The public loses confidence in their government and Democracy itself when an election can be manipulated by a Clerk with no recourse available in the state courts. The ruling of the state supreme court is a reflection of indifference shown by an overworked judicial system.

There has been no Due Process afforded Councilman Lantz. Whether there has been discrimination by the Clerk in the counting of the absentee ballots, based on age, race, sex, or ethnicity, one will not know on this record. The failure to count the remaining absentee ballots may have been done to keep the "senior vote" from Councilman Lantz, as the Councilman is a senior citizen. There will be no answers on this "silent record."

If "a "fair trial" in a fair tribunal is a basic requirement of due process", there has been no Due Process under the 14th Amendment to the United States Constitution. If there is no recourse in our Courts; if there is no Due Process of Law, there will be no le-

gitimacy to any government elected under such a process.

Thousands of citizens will look to see if there are doors to a Court open to review an election dispute. Councilman Lantz looks to this Court as the Court of last resort.

ARGUMENT II

THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DISMISSAL BY THE TRIAL COURT OF COUNCILMAN LANTZ'S COMPLAINT FOR REVIEW OF THE DISPUTED ELECTION OF NOVEMBER 2, 1999, WITHOUT DUE PROCESS OF LAW.

This case involves a 1999 local election where the outcome of the election was decided by 70 votes. Councilman Lantz won a two year term, 71 votes short of the four year term. Councilman Lantz's two year term ends December 31, 2001. The day after the election, it was discovered that over 180 absentee ballots were unopened and uncounted. Over 1,000 ballots remain unaccounted for. Councilman Lantz is a senior citizen who typically receives a significant portion of the absentee voter ballots.

"There is no dispute about the law." Michigan law provides that the absentee ballots have to be in the Clerk's possession at the time the polls close to be counted.,"
(MCL 168.764B(1); MSA 6.176(2)(1).

What is in dispute are matters of fact:

A) Were the 180-218 absentee ballots discovered the morning after the election in the hands of the Clerk prior to the close of the polls?

B) Should those disputed ballots have been counted?

C) Would counting the disputed ballots alter the outcome of the subject election ?

D) Where are the 1,143 absentee ballots which remain una counted for?

E) Were any of those disputed ballots in the hands of the clerk prior to the close of the polls?

F) Should those disputed ballots have been counted; and lastly:

G) Would counting of these disputed ballots alter the outcome of the subject election?

Plaintiff/Appellant has contended and believes that all of the ballots in dispute are in the hands of the Southfield City Clerk, and were in the hands of the Southfield City Clerk on and before the close of the polls election day. Plaintiff/Appellant would support this allegation with:

a. Testimony from Postal Workers;
b. Testimony from City Clerk employees;
c. Review and production of the specific ballots in dispute;
d. Testimony from Election officials.

One piece of relevant evidence on any absentee ballot coming to the Clerk's office through the mail is the postmark. Should absentee ballots have been discovered in the post office and available to the City Clerk prior to the close of the polls, arguably, these ballots should be counted as well.

Plaintiff/Appellant was not afforded discovery of any kind. The

information provided by the postal officials came by way of affidavit on the morning of the show cause hearing of February 9, 2000. There was never an opportunity to cross examine any witnesses pertaining to any information contained in those unsubstantiated statements. Accepting those statements as true, for the sake of argument, leaves open the questions of fact about the absentee ballots themselves.

The one hundred eighty to two hundred eighteen absentee ballots identified in the Trial Court hearing may have sat for weeks in a drawer in the Clerk's office. The one thousand one hundred forty three additional absentee ballots may have a story of their own. Without discovery, and without a trial, the truth of the November 2, 1999 election will never be known. Selection rather than election will be the outcome.

To suggest that there is no genuine issue of a material fact in the case at bar is simply not the case. If the law as cited by the Appellate Court is adopted for purposes of this argument, to wit: Ritchie-Gamester v. City of Berkley, 461 Mich 73, 75-76; 597 NW2d 517 (1999), and the Court considers the lower court record, including all pleadings, affidavits, depositions (none allowed), admissions and other documentary evidence (none allowed), in a light most favorable to the non-moving party, the subject ballots would have been produced and counted. This was not done.

The dispute in this case has not been about the law. It is about facts. The absentee ballots in dispute were proper for counting, and were not counted. The Clerk would neither admit nor deny their existence, and refused to produce them if she had them.

Plaintiff/Appellant is a senior citizen who is a respected member of Council. Many of his constituents vote by absentee ballot. Summary disposition was improper in this election case where particular ballots remain in dispute, denying discovery permitted under the court rules in every other case to ascertain the truth and

particulars of the matter.

If there is no timely remedy in election cases, and no meaningful review of a disputed election, our citizens will lose confidence in their democracy; confidence in their elected officials; and confidence in their Courts.

ARGUMENT III

THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DECISION OF THE TRIAL COURT TO DENY COUNDILMAN LANTZ DISCOVERY PURSUANT TO MICHIGAN COURT RULE RELATIVE TO THE DISPUTED ELECTION OF NOVEMBER 2, 1999, DENYING THE APPELLANT DUE PROCESS OF LAW.

The Trial Court erred in denying Plaintiff/Appellant discovery pursuant to MCR 2.300, et sec. Plaintiff's Motion for Production of all Absentee Ballots from the City of Southfield Election of November 2, 1999 for Inspection was denied by the Trial Court on February 9, 2000. Plaintiff's Motion to Copy Absentee Ballot Jackets from the City of Southfield Election of November 2, 1999 was denied by the Trial Court on February 9, 2000. Plaintiff's Motion to Adjourn the Balance of the Court's Order to Show Cause Pending the Completion of Discovery was denied by the Trial Court on February 9, 2000. No answer was filed by the Defendant relative to any of the above Motions notwithstanding. The relief requested in Plaintiff/Appellant's Motions was for discovery permitted by Michigan Court Rule and within the scope of said rules as previously set forth in MCR 2.302(B)(1):

"(1) In General. Parties may obtain discovery regarding any

matter, not privileged, which is relevant to the subject matter in volved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The information requested by Plaintiff/Appellant was relevant to the subject matter involved in the pending action. Plaintiff/ Appellant would have deposed the Defendant. The disputed ballots would have been the subjects of inquiry. Where are absentee ballots kept when they come in the mail over the course of weeks. Does the Clerk's office have a separate post office box for absentee ballots, or are the ballots commingled with other City Departments' mail. Where are the one thousand plus absentee ballots, which remain unaccounted for? Why would a City Clerk neither admit nor deny the existence of the ballots and refuse to produce them if she had them? Why have the ballots not been voluntarily produced for public scrutiny? Certainly, if deposition questions would have brought answers to suggest that ballots should have been counted, or not, would have moved this election dispute toward resolution.

Denial of discovery adds to the appearance of cover up. Why would the production of disputed ballots in an election not be proper? Why would a discussion of disputed ballots in an election not be proper?

The position of the Plaintiff/Appellant has always been that ballots received by the Clerk before the close of the polls should be counted. Whether the disputed ballots were received by the Clerk

before the close of the polls was the factual issue in dispute. There was no basis for the Trial Court or the Appellate Court to deny Plaintiff/Appellant discovery.

If there is no discovery permitted in election cases; no evidence permitted; no ballots produced; no witnesses or testimony allowed; there will be no meaningful judicial remedy in Michigan relative to disputed elections.

There is a plethora of cases which speak to what is meant by due process of law under the Fourteenth Amendment to the United States Constitution. One such view is set forth: "Concededly, a "fair trial" in a fair tribunal is a basic requirement of due process." Withrow v. Larkin, 421 US 35, at 46, (1975); In Re Murchison, 349 US 133, at 136, (1955). The denial of discovery under Michigan's Court Rule is a denial of due process of law under the 14th Amendment to the United States Constitution. It is more than simple conjecture that a production of the disputed ballots; depositions of the Clerk, postal workers, and staff available to both the Post Office and the Office of the Clerk, together with the production of election records, would have brought this case a long way to settlement; to resolution; or to the point where a trial of the facts would have brought a meaningful resolution. Denial of discovery tools provided under Michigan's Court Rule was a denial of Due Process, and arguably a denial of Equal Protection under the Laws, as set forth in the Fourteenth Amendment to the United States Constitution.. Discovery is widely permitted in Michigan litigation, and the denial of such discovery raises questions of political judgments rather than legal.

CONCLUSION

There is time for this Court to act. There is time for this Court to make a stand to uphold the meaning of Democracy. There is time for this Court to affirm the meaning of Due Process and Fairness in the Courts relative to the elections which determine local governments..

Indifference is not a principle of law. There can not be findings of fact by the Court in the absence of the fact finding process. There can not be Due Process in the absence of fairness. There can not be integrity to an election when the counting of votes is controlled by a Clerk who "will neither admit nor deny the existence of the ballots, and who refuses to produce them if she has them."

If the doors to American justice are closed through indifference, it is not because Petitioner, a senior citizen, has not walked down every road of the process from the Trial Court to this High Court. As a veteran of World War II, Petitioner can only wonder how the Courts of this generation can turn their collective backs on American values of integrity in the process of democratic elections, and fairness in the Courts.

American cynicism with the Courts is heightened by the realization that the Supreme Court of the United States will hear less than ten per cent of its cases. This case is important as Due Process of Law must be applied to election cases across this country. If fundamental fairness is not to be applied in a timely manner in election cases, the reputation of our Courts and the legitimacy of our governments will suffer.

Time remains for this Court to make a difference. The public must have reason to believe that the doors to the Courthouse are open to rich and poor alike....to the mighty and to the weak. Councilman Lantz did not run for President of the United States.

Without the resources of Presidential candidates, he has come to the steps of this Court. On a Councilman's salary and Social Security, he brings his fight to insure future generations of fair elections and due process of law in their review. Councilman Lantz petitions this Court on behalf of all who care about honest elections and the integrity of the judicial process. Those who vote by absentee ballot due to age, or health reasons have a right to anticipate that these votes will be fairly and honestly counted. If the Courts are indifferent to election cases, there shall be no due process of law, and no integrity to the vote in a given election. Any Clerk will be able to manipulate the outcome of any election based on race, age, sex or ethnicity.

This Court should intercede.

RELEIF

Councilman Lantz respectfully prays:

A) That a Writ of Certiorari be ordered;

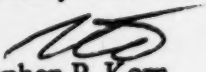
B) That the case be remanded back to the State Courts for an expeditious review of the disputed ballots;

C) That the case be remanded back to the State Courts for expeditious discovery;

D) That the case be remanded back to the State Courts for an expeditious trial;

E) That all proceedings be in accordance with Due Process of Law.

Resepctfully submitted,



Stephen P. Korn

Attorney for Petitioner, Councilman Sidney Lantz

APPENDIX A

DECISION OF THE MICHIGAN COURT OF APPEALS OF MAY 8, 2001

STATE OF MICHIGAN

COURT OF APPEALS

SIDNEY LANTZ,

Plaintiff-Appellee,

V

NANCY BANKS, In her official capacity as CLERK OF THE CITY OF SOUTHFIELD.

Defendant-Appellant.

FOR PUBLICATION
May 8, 2001
9:00 a.m.

No. 225531
Oakland County Circuit Court
No. 99-019368- AW

Before: Hood., P.J., and Doctoroff, and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an Order summarily dismissing his challenge to the November 2, 1999 election for Southfield City Council and the trial court's denial of his motion for production of certain absentee ballots. We affirm.

I. Basic Statement of Facts and Procedural History

On November 2, 1999, an election was conducted for the Southfield City Council. According to the rules of the election, there would be four candidates elected to office. The three candidates

receiving the highest number of votes would be elected to serve four-year terms and the fourth candidate would serve a two-year term. Plaintiff finished fourth, receiving seventy fewer votes than the third place finisher. As such, Plaintiff was elected to serve for two years.

Plaintiff filed a complaint alleging that one hundred eighty absentee ballots postmarked before the close of the election were not counted; that additional ballots were unaccounted for and, the integrity of the electoral process was thereby compromised. Plaintiff further alleged that defendant failed to "call for and receive" absentee ballots from the Southfield Post Office in time to deliver them to the board of election inspectors before the polls closed on election day in violation of MCL 168.765.(3) ; MSA 6.1765(3). Plaintiff sought a writ quo warranto and mandamus compelling defendant to produce all uncounted ballots (particularly the absentee ballots), count all ballots postmarked before the close of polls on election day, and amend the election results accordingly.

The trial court granted plantiff special leave to bring his action quo warranto. In addition, the trial court ordered defendant to show cause why she should not be compelled to produce all ballots not counted on election day, count all absentee ballots postmarked on or before election day, and amend the election results in accord with the new count.

[1] *The order dismissing Plaintiff's complaint, does not indicate whether it was decided pursuant to MCR 2.116(C)(10) (no genuine issue as to any material fact) or MCR 2.116(C)(8) (failure to state a claim). Since the trial court considered documentary evidence submitted beyond the pleadings, we surmise that the trial court dismissed plaintiff's claim on the authority of MCR 2.116(C)(10). We review the trial court's decision accordingly.*

At the show cause hearing, defendant submitted threee separate affidavits establishing that on election day: (1) a representative from the City of Southfield picked up the mail, which included

Absentee ballots, from the Southfield Post Office at approximately 8:00 a.m.[2], (2) the Deputy Clerk received the ballots from this mail run at approximately 8:30 a.m. (3) the Postmaster directed the supervisor in charge of mail processing in Southfield to advise the Postmaster if any ballots or first class mail were available from the 1:30 p.m. delivery; (4) no absentee ballots were available from the 1:30 p.m. delivery time; and (5) even if the Southfield City Clerk phoned the post office between the 8:00 a.m. post office pick-up and before the polls closed, there would not have been any absentee ballots for the city to receive. The plaintiff did not contest the statements contained in these sworn affidavits, instead arguing that the postmark controlled the absentee ballots' eligibility to be counted. The trial court held that the receipt by the clerk of the actual ballot, rather than the postmark controlled and dismissed plaintiff's complaint in its entirety.

[2]The affidavits also established that ballots are delivered via first class mail. At the Southfield Post Office, mail is delivered three times during the day: 5:30 a.m., 7:30 a.m. and 1:30 p.m. The morning deliveries account for the principal source of first class mail prepared for pick-up. The afternoon delivery is much smaller and typically does not include any first class mailings.

II. Standard of Review

A trial court's grant or denial of summary dismissal is reviewed de novo by the Court. *Cork v Applebees of Michigan, Inc.*, 239 Mich App 311, 315; 608 NW2d 62 (2000). When reviewing a trial court's grant of summary disposition pursuant to MCR 2.116 (C)(10), this Court must consider the lower court record, including all pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the non-moving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 75-76; 597 NW2d 517 (1999). Pursuant to the dictates of MCR

2.116(C)(10), where the evidence establishes that there is no genuine issue as to any material fact, the movingparty is entitled to judgment as a matter of law, and the trial court may summarily dismiss plaintiff's cause of action. *Smith v Globe Life Ins Co,* 460 Mich 466, 454-455; 597 NW2d 28 (1999).

III. Plantiff's Contentions

A. Ballots Postmarked On or Before Election Day

Plaintiff first contends that any ballot postmarked on or before the close of polls on election day must be counted and defendant's failure to do so rendered the election invalid. Plaintiff's position is without merit.

The absentee ballot provisions of Michigan election law are specific. MCL 168.764b(1); MSA 6.176(2)(1) provides that "an absent voter's ballot shall be delivered to the clerk only as authorized in the instructions for an absent voter provided in Section 764a'. MCL 168.4a; MSA 6.1764(2) provides in relevant part:

> The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls onelection day. *An absent voter ballot received by the clerk or assistant of the clerk after the close of polls on election day will not be counted.*

The clear language of these statutes indicate that actual receipt of an absentee ballot is paramount. To "receive" the absentee voter ballots presupposes that they are physically in the possession of the clerk or an authorized assistant. If the absentee voter ballot does not reach either of these individuals before the close of polls on election day, they cannot be counted irrespective of the date displayed in the postmark. By suggesting that the date contained

in the postmark should govern, plaintiff ignores the plain language of the statute and attempts to create an ambiguity where none exists. The statute at issue is clear and unequivocal thus, "[l]eav[ing] no room for judicial construction." People v McIntire, 461 Mich 147; 599 NW2d 102 (1999) (citation omitted). The role of the judiciary is to apply the terms of the stature as enacted by the Legislature lest "[a] court ...impermissibly substitute [] its own policy preferences." *Id.*

In the case at bar, the uncontroverted evidence established that on November 2, 1999, after a representative from the city picked up the regular morning mail, there were no additional ballots to pick up before polls closed at 8:00 p.m. The evidence further established that if the post office had received additional ballots after the regular morning pick up, the Postmaster would have phoned the city clerk and made arrangements to deliver the ballots received. Accordingly, the evidence established that defendant received all of the ballots from the post office on election day. Plaintiff conceded these facts. When presented with documentary evidence, plaintiff is not entitled to rely on the bald allegations in the pleadings alone but rather, must come forth with some documentary evidence to demonstrate a genuine factual issue for the court to resolve.[3] Plaintiff failed to do so. Since plaintiff does not claim that the city clerk failed to "deliver" the absentee ballots "received" from the post office to the election inspectors before the polls closed, there is no genuine issue as to any material fact and summary disposition in favor of defendant was therefore warranted.[4] The statutes specifically provide a deadline for absentee ballots based upon the physical receipt of the ballots. The trial court correctly determined that a postmark, standing alone, is irrelevant , and that only those ballots in defendant's possession before the close of polls were eligible to be counted.

[3]*See AFL-CIO v Civil Service Comm, 191 Mich App 535;478 NW2d 722 (1991) (stating that a motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim and dismissal is appropriate where the party opposing the motion "rests upon the mere allegations or denials in the pleadings... ') In the case at bar, the February 9, 1999 hearing was not a motion for summary disposition brought by defendant but was rather a show cause hearing on plaintiff's complaint. Nevertheless, plaintiff is still required to demonstrate a genuine factual dispute justifying a trial.*

[4]*Plaintiff states that "in the absence of discovery plaintiff believes that...all of the ballots in dispute are "in the hands of the Southfield City Clerk and were in the hands of the Southfield City Clerk on and before the close of the polls... " Plaintiff did not make this allegation during the hearing on February 9, 1999, but instead raises it for the first time on appeal. Issues raised for the first time on appal are not properly preserved and thus, "not subject to review" save for "exceptional circumstances." On the record here before us, we do not discern any "extraordinary circumstances' requiring us to abandon this cardinal rule. See Booth Newspapers, Inc. v University of Michigan Bd of Regents, 444 Mich 211,234 n 23; 507 NW2d 422 (1993) (noting that the Court "has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims.")*

B. The Requirement to "Call For and Receive" Ballots

MCL 168.765(3); MSA 6.1766 states in relevant part:

the city...clerk, or authorized designee of the clerk *shall call fo and receive absent voter ballots from the post office* at which the city...clerk regularly receives mail addressed to the city...on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls.

Plaintiff argues that the defendant had an affirmative duty to "call for and receive" absent voter ballots from the post office in sufficient time to deliver them to the board of election inspectors before the polls closed and she failed to do so. Although defendant did not "call for" absentee voter ballots from the post office, the

uncontested evidence adduced at the hearing established that after the 8:00 a.m. morning mail pick-up , no other absentee ballots came into the post office for delivery to the city clerk. Moreover, the evidence established that if indeed absentee voter ballots were received at the post office by virtue of the afternoon mail delivery on November 2, 1999, the post office would have called the city to "ascertain where the ballots should be delivered." The defendant's definitively established that there were no ballots to deliver. Accordingly, there was no genuine, material factual issue precluding summary disposition.

C. Production of Ballots

Plaintiff finally argues that the trial court erred when it denied Plaintiff's Motion for Production of All Absentee Ballots From the City of Southfield Election of November 2, 1999 for Inspection. A trial court's decision to deny discovery will not be overturned absent an abuse of discretion. Baker v Oakwood Hospital Corp, 239 Mich App 461, 478; 608 NW2d 823 (2000).

In the case at bar, the trial court did not abuse its discretion when it denied plaintiff's discover requests. Plaintiff does not allege or otherwise argue that the uncounted absentee ballots requested actually reached the city clerk's office before the polls closed on election day but were not delivered to the board of election inspectors for counting. In fact, plaintiff submits that absentee ballots postmarked on or before November 2, 1999 should be counted regardless of when the city clerk actually receives them. Plaintiff's position flies in the face of the clear and unambiguous language employed in the statutes and the uncontested facts adduced at the February 9, 1999 hearing. The information sought by plaintiff in discovery is not even marginally relevant considering the applicable law discussed herein. Accordingly, the trial court

did not commit error requiring reversal by denying plaintiff's request for discovery.

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly

APPENDIX B

DECISION OF THE OAKLAND COUNTY CIRCUIT COURT
OF
FEBRUARY 18, 2000

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SIDNEY LANTZ,
Plaintiff,

Vrs.

Case no. 99-019368 AW
Judge Nanci J. Grant

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,
Defendant.

_____/

STEPHEN P. KORN (P-30913)
Attorney for Plaintiff
30800 Van Dyke Suite 206
Warren, Michigan 48093
(810)-751-1696

GERALD A. FISHER (P-13462)
Attorney for Defendant
SECREST, WARDLE, LYNCH,
HAMPTON, TRUEX AND MORLEY
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, Michigan 48333-3040
(248)-851-9500

_____/

OPINION AND ORDER

At a session of said Court, held in the Courthouse in the City of Pontiac, County

of Oakland, State of Michigan on the 18th
day of February, 2000.

PRESENT: HONORABLE, CIRCUIT JUDGE

This matter, having come before the court on Plaintiff's motion for production of documents, said motion is DENIED and the action is DISMISSED.

The following facts are undisputed. On November 2, 1999, the predecessor Clerk for the City of Southfield City Counsel conducted an election, which included the race for Southfield City Council. At approximately 8:00 a.m. on November 2, 1999, the United States Post Office delivered to the City Clerk all absentee ballots received by that time. The Post Office made no other deliveries of absentee ballots that day, nor did the City Clerk contact the post office to inquire into whether additional ballots had arrived.

The City Council election was close, with only a 70-vote difference between third and fourth place. Plaintiff then discovered that the City had received at least 180 absentee ballots after the polls closed, which were not counted in the election. Moreover, those ballots were postmarked on November 2, 1999. Thus, Plaintiff filed suit to challenge the election, arguing that the absentee ballots postmarked on election day should have been counted in the election.

In this motion, Plaintiff seeks an order compelling production and/or copying of all absentee ballots and ballot jackets. In response, Defendants assert not only that the motion should be denied, but also that Plaintiff's claim should be dismissed in its entirety.

In considering this motion, the Court must first address the legal theories under which Plaintiff brings his claim. In support of its application for action quo warranto, Plaintiff asserts that an absentee ballot must be counted so long as it is postmarked on the date of the election, regardless of where that post mark originated or

whether the ballot was received by the Clerk before the poles close. The Court disagrees. The absentee ballot provisions of Michigan election law, MCL 168.758-168.769a, provide a detailed description of the procedures for absentee voting, and do not contain such a provision regarding postmarks. In fact, MCL 168.764a explicitly provides: "The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day" and "an absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted." In this context, the Court finds Plaintiff's interpretation to be untenable. Rather, the postmark is irrelevant, and an absentee ballot must be counted only if it reaches the clerk before the close of polls on election day.

Plaintiff also argues that the Clerk did not comply with MCL 168.765. Specifically, subsection (3) requires the City Clerk to "call for and receive absent voter ballots from the post office...on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls." Plaintiff claims that the City Clerk did not comply with this subsection because she did not take any steps to receive absentee ballots from the post office after receiving the 8:00 am mail delivery on election day. The Court disagrees. Specifically, the Court finds that the Clerk satisfies his or her obligations under the statute by accepting the Post Office's regularly scheduled election day mail delivery.

In light of the foregoing, the Court sees no way that Plaintiff can prevail even if absentee ballots were delivered to the post office on November 2, 1999, after the 8:00 am mail delivery to the City. Therefore, Plaintiff's current motion is denied, and the action is dismissed.

CIRCUIT JUDGE

APPENDIX C

DECISION OF THE MICHIGAN SUPREME COURT OF
AUGUST 28, 2001
DENYING REVIEW

ORDER
Entered: August 28, 2001

Michigan Supreme Court
Lansing, Michigan

SIDNEY LANTZ,
Plaintiff-Appellant,

V

SC: 119260
COA: 225531
Oakland CC: 99-019368-AW

SOUTHFIELD CITY CLERK,
Defendant-Appellee.

On order of the Court, the motion for immediate consideration is GRANTED. The Application for leave to appeal from the May 8, 2001, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to strike is also considered, and it is DENIED as moot.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 28, 2001

Corbin R. Davis
Clerk

(2)

Supreme Court, U.S
FILED
NOV 14 2001
OFFICE OF THE CLERK

No. 01-628

In The

Supreme Court of the United States

COUNCILMAN SIDNEY LANTZ,

Petitioner,

vs.

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,

Respondent.

On Petition For A Writ Of *Certiorari* To The Court Of Appeals For The State Of Michigan

ANSWER TO PETITION FOR WRIT OF *CERTIORARI*

MICHAEL L. UPDIKE
Counsel of Record for Respondent
SECREST, WARDLE, LYNCH, HAMPTON, TRUEX AND MORLEY
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, Michigan
48333-3040
(248) 851-9500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Michigan law requires that all absentee votes that are to be counted in an election must be received by the responsible election official before the close of voting on election day. Following the counting of all votes cast on election day and all absentee ballots received by close of voting on election day, Petitioner was elected to a two-year term as a municipal councilperson. Petitioner filed suit in a Michigan state court to force Respondent, the responsible election official for the municipality, to count absentee ballots received *after* the close of voting on election day, but postmarked *by* election day. A Michigan Circuit Court granted Respondent the Michigan equivalent of summary judgment and dismissed Plaintiff's case on the basis Michigan law barred Petitioner's cause of action. The Michigan Court of Appeals affirmed the lower court, and the Michigan Supreme Court declined to review the case. Under these circumstances, should the United States Supreme Court grant *certiorari* to review the decisions of Michigan courts that Michigan law requires absentee ballots to be received by the responsible election official *before* the close of voting on election day to be counted?

Petitioner would presumably contend that the answer to the question is *"Yes"*.

Respondent would respectfully suggest that the answer to the question should be *"No"*.

The lower courts were not asked the question.

LIST OF PARTIES

All parties to the case appear in the caption of the case as presented on the cover page to this Answer to Petitioner's Petition for a Writ of *Certiorari*.

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INTRODUCTORY STATEMENT

A reading of Petitioner's Complaint in the original Michigan state court (the Oakland County Circuit Court), "Exhibit A" in the Appendix to this Answer, and the state court's February 18, 2000, Opinion and Order, "Exhibit B" in the Appendix, establishes beyond peradventure that there is no significant federal question in this case and that Petitioner's Petition for a Writ of *Certiorari* should be denied forthwith.

There was a regularly scheduled municipal election held in the City of Southfield, Oakland County, Michigan on November 2, 1999. The four candidates who received the most votes in the election were elected or reelected to Southfield's City Council. The four were rank-ordered, with the first, second and third place finishers earning four-year terms on the Council and the fourth place finisher a two-year term on the Council.

Petitioner was the fourth of the top four candidates for Council on November 2, 1999, so was awarded a two-year term on the Council. Petitioner was 70 votes behind the third-place finisher, the third-place finisher receiving the last four-year term on the council.

Additional absentee ballots were delivered to Respondent, the City Clerk for the City of Southfield and the municipal official in charge of elections, for some days after November 2, 1999. Michigan law requires that any absentee ballot must be delivered to the responsible local election official or his/her designee **before** the close of voting on election day to be counted. Since the

absentee ballots arrived after the close of voting on election day, Respondent could not lawfully count them and did not count them.

Petitioner filed suit against Respondent, asking the Oakland County Circuit Court to force Respondent to count all absentee ballots regardless of when they were received, as long as they were postmarked by election day (*i.e.*, November 2, 1999). The Circuit Court, relying on the plain language of Michigan Complied Laws (hereinafter MCL) Section 168.764a (please see "Exhibit B" and "Exhibit C" in the Appendix), dismissed Petitioner's case. Petitioner appealed the Circuit Court's decision to the Michigan Court of Appeals, the Michigan Constitution of 1963 allowing Petitioner an appeal as of right from the Circuit Court to the Court of Appeals. The Court of Appeals found that the Circuit Court had correctly interpreted and applied the statute (that is, MCL Section 168.764a) and affirmed the Circuit Court. Petitioner sought leave to appeal the decision of the Court of Appeals to the Michigan Supreme Court, as permitted under the Michigan Court Rules of 1985, specifically Michigan Court Rule (MCR) 7.302 *et seq.* The Supreme Court denied leave and Petitioner filed a Petition for a Writ of *Certiorari* with this United States Supreme Court.

In the courts below, Petitioner was unable to come forward with any evidence that any absentee ballots that were not counted by Respondent were received prior to the close of voting on November 2, 1999. The evidence was that **all** absentee ballots that had been received by Respondent by close of voting on November 2, 1999 **had** been counted and included in the official tabulation for the election. Further, Petitioner conceded in the courts

below that the absentee ballots received by Respondent after the election, approximately 180, would not likely have changed the result of the election had they been counted in clear violation of state law. Petitioner was 70 votes behind the last candidate who received a four-year term after all ballots received by close of voting on November 2, 1999 had been counted. It was wildly unlikely that the 180 absentee ballots contained 71 more votes for Petitioner than the votes cast in those 180 ballots for the third-place finisher among the Council candidates.

What was at issue in the courts below was the proper interpretation and application of the plain and unambiguous language of a state law of long standing that has no federal due process, equal protection or other federal constitutional ramifications whatsoever. There was and is no federal question here, and Petitioner's Petition for a Writ of *Certiorari* is merely the last step in a quest that would do credit to Cervantes' Don Quixote. The United States Supreme Court should not hesitate in issuing an Order that denies Petitioner's Petition for a Writ of *Certiorari*.

CITATIONS OF OPINIONS AND ORDERS FROM THE LOWER COURTS

The orders and opinions of Michigan Circuit Court are not formally reported. The citation for the February 18, 2000 Opinion and Order of the Honorable Nanci J. Grant (Judge Grant) of the Oakland County Circuit Court would be *Sidney Lantz* v. *Nancy Banks, in her Official Capacity as Clerk for the City of Southfield*, Oakland County

Circuit Court Civil Action Number 99-019368 AW, Opinion and Order *rel'd* 2/18/00 (unpublished).

The decision and opinion of the Michigan Court of Appeals in this case is *Sidney Lantz* v. *Nancy Banks, in her Official Capacity as Clerk for the City of Southfield*, reported at 245 Mich. App. 621, 628 N.W.2d 583 (2001), *lv den* 4___ Mich. ___, 634 N.W.2d 352 (2001).

The Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal the decision and opinion of the Court of Appeals in this case is reported at 4___ Mich. ___, 634 N.W.2d 352 (2001), *Sidney Lantz* v. *Nancy Banks, in her Official Capacity as Clerk for the City of Southfield.*

COMMENT ON PETITIONER'S "STATEMENT FOR JURISDICTION"

Respondent acknowledges that Petitioner exhausted his state appellate rights, except for the right to file a Motion for Reconsideration with the Michigan Supreme Court pursuant to MCR 7.313(E), when the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal in an order entered by that forum on August 28, 2001.

COMMENT ON PETITIONER'S "CONSTITUTIONAL PROVISIONS, STATUTES"

Petitioner cites the Fourteenth Amendment to the United States Constitution of 1787 and MCR 2.302(B)(1)

in his Petition. Petitioner fails to explain how a Michigan statute that requires all absentee votes to be physically received by the responsible election official before the close of voting on election day violates either one.

It is Respondent's position that there are no federal constitutional or other questions at issue in the case at bar and that Petitioner's Petition for a Writ of *Certiorari* should be denied by this Supreme Court forthwith.

COUNTERSTATEMENT OF FACTS

On November 2, 1999, an election took place in the City of Southfield, a large suburb abutting Detroit, Michigan. The election included the race for Southfield City Council. There were four positions to be filled. The first three finishers (that is, the first, second and third place finishers) were elected to four-year terms on the Council. The fourth place finisher was elected to a two-year term. Petitioner finished fourth, 70 votes behind the third place finisher, so received a two-year term on the Council.

A number of absentee ballots were received by the City **after** the close of polls on November 2, 1999, bearing various postmarks from around the country. Petitioner claims that there were at least 180 absentee ballots that were postmarked on or before November 2, 1999, and that such ballots may have impacted the outcome of the election. Petitioner has no idea whether these votes, received after election day, would be otherwise valid (*i.e.*, the envelope containing the ballot was correctly signed by the voter, the ballot was not overvoted, *et cetera*). Petitioner has acknowledged, however, that it was

unlikely the absentee ballots received after the close of voting on November 2, 1999 would allow him to overtake the third place finisher among Council candidates and thus receive a four-year term on the Council rather than the two-year term he won. That aside, Petitioner asserts that these absentee ballots should have been counted if the postmark was stamped on or before November 2, 1999, regardless of whether they were delivered to Respondent, the Southfield City Clerk, or her designee prior to the close of voting on election day. Respondent did not count any absentee ballots that were received after the close of voting on election day, pursuant to MCL Section 168.764a, which provides the following "Instructions for Absent Votes":

> Step 6. The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted.

The record in this case includes an Affidavit of the Postmaster of the Southfield, Michigan, Post Office ("Exhibit D" in the Appendix), explaining that there are three times during the day that mail may be available for pick-up or delivery prior to 8:00 P.M. (the time the polls close). There are two morning deliveries (5:30 A.M. and 7:30 A.M.). They are the primary source of mail that is prepared for pick-up and delivery after 7:30 A.M. In addition, there is a secondary delivery time, when a much smaller quantity of mail (and which typically includes no first class mail, all absentee ballots being sent by first class) may become available for pickup at 1:30

P.M. There were additional Affidavits filed by the Supervisor of Customer Service for the Southfield, Michigan, Post Office ("Exhibit E" in the Appendix), and an Affidavit of the Deputy Clerk for the City of Southfield ("Exhibit F" in the Appendix). All three Affidavits were made part of the record of the show cause hearing of February 9, 2000 before Judge Grant in this case. The February 8, 2000 hearing will be discussed *infra*.

The Affidavits indicate that Respondent's office received a mail delivery at approximately 8:30 A.M. on election day, November 2, 1999. This delivery included some absentee ballots. The Affidavits further indicated that it had been past practice that, if there had been any ballots available in connection with the 1:30 P.M. delivery on November 2, 1999, the Post Office would have called the City of Southfield to learn where the ballots should be delivered. The Post Office would have delivered them to the City. The Affidavits show there was no need for communication between the City and the Post Office following the morning mail delivery **because there were no more absentee ballots at the Post Office.**

Having received the November 2, 1999, mail delivery, Respondent did not need to inquire as to whether there was mail containing ballots at the Post Office later the same day, and, in all events, it obviously would have made no difference in the outcome of the election if Respondent had made such a call. **There were no more ballots at the Post Office!**

After the election, Plaintiff filed an action for *quo warranto* and *mandamus* directed against Respondent in the Oakland County Circuit Court, where the case was

assigned to Judge Grant. Judge Grant ordered Respondent to appear and show cause why she should not be compelled to:

A. Produce all ballots not counted on November 2, 1999, and particularly, all absentee ballots not counted on November 2, 1999;

B. Count all absentee ballots, which were postmarked before the close of election polls on November 2, 1999;

C. Amend its election results consistent with the counting of all ballots as determined by order of the Court.

Judge Grant also asked Respondent to explain why a *writ quo warranto* and/or *writ of mandamus* should not issue to address any failure of Respondent to count absentee ballots **postmarked** before the close of polls on November 2, 1999, regardless of when the ballots were actually received by Respondent.

Nine days before the date set for the show cause hearing, Petitioner filed certain discovery requests with Respondent. Under MCR 2.309(B)(4) and MCR 2.310(C)(2), Respondent had 28 days to respond to Petitioner's request. Petitioner made no effort to shorten the time for Respondent's response, although such requests are permitted under the applicable court rules. Respondent therefore had no duty to respond to Petitioner's discovery requests before the show cause hearing. Petitioner had requested that all absentee ballots from the November 2, 1999 election be produced.

Respondent filed an Answer to Petitioner's Complaint. Counsel for Respondent was subsequently able to

inspect the absentee ballots that arrived at the City following the close of polls on election day (that is, after November 2, 1999). There had not been an opportunity to do so prior to the filing of the Answer to Petitioner's Complaint. Consequently, Respondent's Answer had been limited, for all practical purposes, to neither admitting nor denying the existence of the ballots referred to by Petitioner in his Complaint.

The hearing on Judge Grant's Order to Show Cause was held on February 9, 2000. Respondent presented the Affidavits referred to *supra* (*i.e.*, Exhibits "D", "E" and "F"), which established that all absentee ballots in the hand of Respondent's office by the close of voting on November 2, 1999 had been counted. Respondent also moved for the dismissal of Petitioner's cause of action. Plaintiff did not oppose Respondent's request with any Counter-Affidavits or any other admissible evidence that demonstrated there was a genuine dispute of any issue of material fact in the case relative to the receipt of absentee ballots prior to the close of election days that had not been counted by Respondent. Judge Grant took the matter under advisement and issued the following Opinion and Order on February 18, 2000.

> This matter, having come before the Court on Plaintiff's motion for production of documents, said motion is DENIED and the action is DISMISSED.
>
> The following facts are undisputed. On November 2, 1999, the predecessor Clerk for the City of Southfield City Council conducted an election, which included the race for Southfield City

Council. At approximately 8:00 A.M. on November 2, 1999, the United States Post Office delivered to the City Clerk all absentee ballots received at that time. The Post Office made no other deliveries of absentee ballots that day, nor did the City Clerk contact the post office to inquire into whether additional ballots had arrived.

The City Council election was close, with only a 70-vote difference between third and fourth place. Plaintiff then discovered that the City had received at least 180 absentee ballots after the polls closed, which were not counted in the election. Moreover, those ballots were postmarked on November 2, 1999. Thus, Plaintiff filed suit to challenge the election, arguing that the absentee ballots postmarked on election day should have been counted in the election.

In this motion, Plaintiff seeks an order compelling production and/or copying of all absentee ballots and ballot jackets. In response, Defendants assert not only that the motion should be denied, but also that Plaintiff's claim should be dismissed in its entirety.

In considering this motion, the Court must first address the legal theories under which Plaintiff brings his claim. In support of its application for action *quo warranto*, Plaintiff asserts that an absentee ballot must be counted so long as it is postmarked on the date of the election, regardless of where that postmark originated or whether the ballot was received by the Clerk before the polls closed. The Court disagrees. The absentee ballot provisions of Michigan election law, MCL Sections 158.758-168.769a, provide a detailed description of the procedures for

absentee voting, and do not contain such a provision regarding postmarks. In fact, MCL Section 168.764 explicitly provides: "The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day" and "an absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted." In this context, the Court finds Plaintiff's interpretation to be untenable. Rather, the postmark is irrelevant and an absentee ballot must be counted only if it reaches the clerk before the close of the polls on election day.

Plaintiff also argues that the Clerk did not comply with MCL Section 168.765. Specifically, subsection (3) requires the City Clerk to "call for and receive absent voter ballots from the post office . . . on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls." Plaintiff claims that the City Clerk did not comply with this subsection because she did not take any steps to receive absentee ballots from the post office after receiving the 8:00 A.M. mail delivery on election day. The Court disagrees. Specifically, the Court finds that the Clerk satisfies his or her obligations under the statute by accepting the Post Office's regularly scheduled election day mail delivery.

In light of the foregoing, the Court sees no way that Plaintiff can prevail even if absentee ballots were delivered to the post office on November 2, 1999, after the 8:00 A.M. mail delivery to the City. Therefore, Plaintiff's current motion is denied and the action is dismissed.

Petitioner appealed the dismissal of his lawsuit to the Michigan Court of Appeals pursuant to the provisions of MCR 7.203(A) *et seq*. Petitioner's appeal was duly briefed and argued before that forum. On May 8, 2001, the Court of Appeals issued a decision and opinion which affirmed the February 18, 2000 Opinion and Order of Judge Grant. The decision and opinion of the Court of Appeals is presented below for the convenience of the United States Supreme Court, footnotes omitted. A copy of the decision and opinion with footnotes, along with a copy of the August 28, 2001 Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal, may be found in "Exhibit G" in the Appendix.

> Plaintiff appeals as of right from an order summarily dismissing his challenge to the November 2, 1999, election for Southfield City Council and the trial court's denial of his motion for production of certain absentee ballots. We affirm.

I. Basic Statement of Facts and Procedural History

> On November 2, 1999, an election was conducted for the Southfield City Council. According to the rules of the election, there would be four candidates elected to office. The three candidates receiving the highest number of votes would be elected to serve four-year terms and the fourth candidate would serve a two-year term. Plaintiff finished fourth, receiving seventy fewer votes than the third-place finisher. As such, plaintiff was elected to serve for two years.
>
> Plaintiff filed a complaint alleging that 180 absentee ballots postmarked before the close of

the election were not counted, that additional ballots were unaccounted for, and that the integrity of the electoral process was thereby compromised. Plaintiff further alleged that defendant failed to "call for and receive" absentee ballots from the Southfield Post Office in time to deliver them to the board of election inspectors before the polls closed on election day in violation of MCL Section 168.765(3). Plaintiff sought a writ *quo warranto* and *mandamus* compelling defendant to produce all uncounted ballots (particularly the absentee ballots), count all ballots postmarked before the close of the polls on election day, and amend the election results accordingly.

The trial court granted plaintiff special leave to bring his action *quo warranto*. In addition, the trial court ordered defendant to show cause why she should not be compelled to produce all ballots not counted on election day, count all absentee ballots postmarked on or before election day, and amend the election results in accord with the new count.

At the show cause hearing, defendant submitted three separate affidavits establishing that on election day: (1) a representative from the city of Southfield picked up the mail, which included absentee ballots, from the Southfield Post Office at approximately 8:00 a.m.; (2) the deputy clerk received the ballots from this mail run at approximately 8:30 a.m.; (3) the postmaster directed the supervisor in charge of mail processing in Southfield to advise the postmaster if any ballots or first-class mail were available from the 1:30 p.m. delivery; (4) no absentee

ballots were available from the 1:30 p.m. delivery time; and (5) even if the Southfield City Clerk telephoned the post office between the 8:00 a.m. post office pick-up and before the polls closed, there would not have been any absentee ballots for the city to receive. The plaintiff did not contest the statements contained in these sworn affidavits, instead arguing that the postmark controlled the absentee ballots' eligibility to be counted. The trial court held that the receipt by the clerk of the actual ballot, rather than the postmark, controlled, and dismissed plaintiff's complaint in its entirety.

II. Standard of Review

A trial court's grant or denial of summary dismissal is reviewed de novo by this Court. *Cork* v. *Applebee's of Michigan, Inc.*, 239 Mich. App. 311, 315, 608 N.W.2d 62 (2000). When reviewing a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must consider the lower court record, including all pleadings, affidavits, depositions, admissions, and other documentary evidence submitted, in a light most favorable to the nonmoving party. *Ritchie-Gamester* v. *City of Berkley*, 461 Mich. 73, 75-76, 597 N.W.2d 517 (1999). Pursuant to the dictates of MCR 2.116(C)(10), where the evidence establishes that there is no genuine issue concerning any material fact, the moving party is entitled to judgment as a matter of law, and the trial court may summarily dismiss the plaintiff's cause of action. *Smith* v. *Globe Life Insurance Company*, 460 Mich. 446, 454-455, 597 N.W.2d 28 (1999).

III. Plaintiff's Contentions

A. Ballots Postmarked On or Before Election Day

Plaintiff first contends that any ballot postmarked on or before the close of the polls on election day must be counted and defendant's failure to do so rendered the election invalid. Plaintiff's position is without merit.

The absentee ballot provisions of Michigan election law are specific. MCL Section 168.764b(1) provides that "an absent voter ballot shall be delivered to the clerk only as authorized in the instructions for an absent voter provided in Section 764a." MCL Section 168.764a provides in relevant part:

> The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. *An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted.* [Emphasis added.]

The clear language of these statutes indicates that actual receipt of an absentee ballot is paramount. To "receive" the absentee voter ballots presupposes that they are physically in the possession of the clerk or an authorized assistant. If an absentee voter ballot does not reach either of these individuals before the close of the polls on election day, the ballot cannot be counted irrespective of the date displayed in the postmark. By suggesting that the date contained in the postmark should govern, plaintiff ignores the plain language of the statute and attempts to create an ambiguity where none exists. The statute at issue is clear and unequivocal thus,

" ' "[l]eav[ing] no room for judicial construction." ' " *People* v. *McIntire*, 461 Mich. 147, 153, 599 N.W.2d 102 (1999) (citation omitted). The role of the judiciary is to apply the terms of the statute as enacted by the Legislature lest "a court . . . impermissibly substitute its own policy preferences." *Id.*

In the case at bar, the uncontroverted evidence established that on November 2, 1999, after a representative from the city picked up the regular morning mail, there were no additional ballots to pick up before the polls closed at 8:00 P.M. The evidence further established that if the post office had received additional ballots after the regular morning pick-up, the postmaster would have telephoned the city clerk and made arrangements to deliver the ballots received. Accordingly, the evidence established that defendant received all the ballots from the post office on election day. Plaintiff conceded these facts. When presented with documentary evidence, plaintiff is not entitled to rely on the bald allegations in the pleadings alone but, rather, must come forth with some documentary evidence to demonstrate a genuine factual issue for the court to resolve. Plaintiff failed to do so. Because plaintiff does not claim that the city clerk failed to "deliver" the absentee ballots "received" from the post office to the election inspectors before the polls closed, there is no genuine issue concerning any material fact and summary disposition in favor of defendant was therefore warranted. The statutes specifically provide a deadline for absentee ballots based on the physical receipt of the ballots. The trial court correctly determined that a postmark, standing alone, is irrelevant and that only those ballots in

defendant's possession before the close of the polls were eligible to be counted.

B. The Requirement to "Call For and Receive" Ballots

MCL Section 168.765(3) states in relevant part:

> The city . . . clerk, or authorized designee of the clerk *shall call for and receive absent voter ballots from the post office* at which the city . . . clerk regularly receives mail addressed to the city . . . on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls. [Emphasis added.]

Plaintiff argues that the defendant had an affirmative duty to "call for and receive" absentee voter ballots from the post office in sufficient time to deliver them to the board of election inspectors before the polls closed and that she failed to do so. Although defendant did not "call for" absentee voter ballots from the post office, the uncontested evidence adduced at the hearing established that after the 8:00 A.M. morning mail pick-up, no other absentee ballots came into the post office for delivery to the city clerk. Moreover, the evidence established that if indeed absentee voter ballots were received at the post office in the afternoon mail delivery on November 2, 1999, the post office would have called the city to "[a]scertain where [the ballots] should be delivered." The defendant's failure to "call for" the absentee ballots is inapposite because the evidence presented definitively

established that there were no ballots to deliver. Accordingly, there was no genuine issue of material fact precluding the granting of summary disposition.

C. Production of Ballots

Plaintiff finally argues that the trial court erred in denying plaintiff's motion to produce for inspection all the absentee ballots for the contested election. A trial court's decision to deny discovery will not be overturned absent an abuse of discretion. *Baker* v. *Oakwood Hospital Corporation*, 239 Mich. App. 461, 478, 608 N.W.2d 823 (2000).

In the case at bar, the trial court did not abuse its discretion by denying plaintiff's discovery requests. Plaintiff does not allege or otherwise argue that the uncounted absentee ballots requested actually reached the city clerk's office before the polls closed on election day but were not delivered to the board of election inspectors for counting. In fact, plaintiff submits that absentee ballots postmarked on or before November 2, 1999, should be counted regardless of when the city clerk actually receives them. Plaintiff's position flies in the face of the clear and unambiguous language employed in the statutes and the uncontested facts adduced at the February 9, 1999, hearing. The information sought by plaintiff in discovery is not even marginally relevant considering the applicable law discussed herein. Accordingly, the trial court did not commit error requiring reversal by denying plaintiff's request for discovery.

Affirmed.

Sidney Lantz v. *Nancy Banks, in her official capacity as Clerk of the City of Southfield, supra.*

Petitioner then applied for leave to appeal the May 8, 2001 decision and opinion of the Michigan Court of Appeals to the Michigan Supreme Court, pursuant to the provisions of MCR 7.302 *et seq.* The Supreme Court denied leave to appeal in an Order entered on August 28, 2001.

Petitioner ran for re-election to the Southfield City Council on November 6, 2001. He again finished fourth and was again elected to a two-year term. This time, he finished 536 votes behind the third-place finisher. As far as is known, Petitioner is not challenging the way absentee ballots were handled by Respondent's office in the 2001 election, although they were, for all intents and purposes, handled in exactly the same way they were handled in the 1999 election.

Petitioner's Petition for a Writ of *Certiorari* to this United States Supreme Court followed in due course. The instant document is Respondent's Answer to Petitioner's Petition.

ARGUMENT

Michigan law requires that all absentee votes that are to be counted in an election must be received by the responsible election official before the close of voting on election day. Following the counting of all votes cast on election day and all absentee ballots received by close of voting on election day, Petitioner was elected to a two-year term as a municipal councilperson. Petitioner filed suit in a Michigan state court to force Respondent, the responsible election official for the municipality, to count absentee ballots received *after* the close of voting on election day, but postmarked *by* election day. A Michigan Circuit Court granted Respondent the Michigan equivalent of summary judgment and dismissed Plaintiff's case on the basis Michigan law barred Petitioner's cause of action. The Michigan Court of Appeals affirmed the lower court, and the Michigan Supreme Court declined to review the case. Under these circumstances, the United States Supreme Court should *not* grant *certiorari* to review the decisions of Michigan courts that Michigan law requires absentee ballots to be received by the responsible election official *before* the close of voting on election day to be counted.

I. The evolving nature of Petitioner's claims

As a preliminary matter, it must be clearly understood that the case presented in Petitioner's Petition for a Writ of *Certiorari* is not the one presented in the Circuit Court. As the matter has progressed through the various levels of appellate review, Petitioner's theories of relief have "evolved", not unlike birds are said to have evolved from dinosaurs. Such an approach to litigation is not fair to either the parties or to the lower courts, and makes it

nearly impossible for a higher court to conduct meaningful review of the litigation.

For example, Petitioner's claims in his Petition that there were over 1,000 absentee ballots that were not accounted for in the November 2, 1999 election. Where Petitioner got this figure is unknown, but thin air seems to be the most logical source. In point of fact, all Petitioner ever claimed in the Circuit Court was that there were 180 unaccounted absentee ballots. Petitioner's counsel, the same counsel who submitted Petitioner's Petition to this United States Supreme Court, stated that it was "unknown" whether there were more than 180 uncounted absentee ballots in the Circuit Court hearing. What is "unknown" is where Petitioner and his counsel got the figure of 1,000 absentee ballots that were supposedly not accounted for in the November 2, 1999 election.

Petitioner may well **believe** that all of the absentee ballots that were not counted in the November 2, 1999 election were in the hands of Respondent's office by close of voting on election day. That does not change the fact Petitioner had and has absolutely no proof that **any** otherwise valid absentee ballots that were not counted were in Respondent's office by the close of election day. It has never been disputed that there were a number of absentee ballots in Respondent's office by election day that were not counted because of various defects (*i.e.*, the voter failed to sign the envelope containing the ballot, the ballot was overvoted, *et cetera*). All this was placed on the record by Respondent's counsel at the February 9, 2000 hearing before Judge Grant. It is significant that Petitioner was unable to oppose Respondent's request in the

Circuit Court that Petitioner's case be dismissed by Affidavits based on personal knowledge, which is a requirement under the Michigan Court Rules of 1985, specifically MCR 2.116(G)(4). By contrast, Respondent supported her request for dismissal of Petitioner's case in the Circuit Court with no less than three Affidavits (*i.e.*, Exhibits "D", "E" and "F" in the Appendix), **not one** of which was challenged by Petitioner's counsel in the Circuit Court. If a party's "belief" is all that is necessary to defeat a motion for summary judgment (called summary disposition in Michigan), summary judgment could **never** be granted and every single case would have to be decided by a full trial on the merits. It is difficult to imagine a better prescription for judicial chaos.

Petitioner originally started this lawsuit because he thought absentee ballots postmarked by election day should be counted, even if they were not received by the appropriate municipal official by the close of voting on election day. When it became clear that Petitioner's position was completely untenable under Michigan law, he experienced something akin to a religious conversion and discovered that: (a) Respondent actually had the 180 absentee ballots by close of voting on November 2, 1999; and/or (b) there were over a thousand absentee ballots that could not be accounted for. Petitioner had and has no basis for his theory, other than his "belief", and that is, at bottom, why Petitioner's Petition should be denied.

II. The courts below correctly decided the case

The Instructions for Absent Voters provided in MCL Section 168.764a contain the following provision:

> Step 6. The ballot *must* reach the clerk or an authorized assistant of the clerk **before the close of the polls on election day** (Emphasis added).

Petitioner has, for all practical purposes, conceded defeat on the issue of whether it is necessary to count absentee ballots postmarked on or before the election date, but not in the possession of the Clerk prior to the close of polls on that date. As noted *supra*, this had originally been the centerpiece of Plaintiff's case. See Complaint, "Exhibit A" in the Appendix, Paragraphs 11, 12, and 26; the statements of relief sought in both counts of the Complaint; and, the Order to Show Cause prepared by Petitioner and signed by the Trial Court, "Exhibit H" in the Appendix.

Having made this concession, Plaintiff argues issues which were not in his Complaint, or which were otherwise preserved for review.

A. Petitioner's new claim that absentee ballots were in Respondent's hands by close of voting on November 2, 1999 is sheer guess, conjecture and speculation on Petitioner's part, not founded on anything in the record, and not raised in the trial court

Petitioner claims Respondent may have actually had a number of absentee ballots prior to the close of polls on election day and simply did not count them.

This unpleaded, outside-the-record allegation has no place in any appellate court, much less our nation's highest court. The pleadings filed in this case charge that all

absentee ballots *postmarked* on or before election day must be counted. Having acknowledged to the Circuit Court that the existence of more than 180 ballots was "unknown", Petitioner nevertheless proceeded to argue on appeal that some 1,000 additional absentee ballots are at issue, and to suggest that they may have been in the hands of Respondent. The Circuit Court was not presented with these allegations, and it was entirely appropriate that neither the Michigan Court of Appeals nor the Michigan Supreme Court considered them. *Napier* v. *Jacobs*, 429 Mich. 222, 227, 414 N.W.2d 862, 864 (1987). It is appropriate for this United States Supreme Court to decline review for the same reason. See, generally, *Yee* v. *City of Escondido, California*, 503 U.S. 519, 533, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); see also *Illinois* v. *Gates*, 462 U.S. 213, 218-220, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

B. The Trial Court Correctly Denied Plaintiff Discovery

As explained *supra*, the Circuit Court denied Plaintiff's Motion for Production of All Absentee Ballots as part of the decision of February 18, 2000. It should be clearly understood that Petitioner had **deliberately delayed** in seeking discovery in the case, and has no one but himself to blame for any difficulty that delay may have caused him in presenting his case to the Circuit Court.

It is undisputed that Petitioner's Complaint was filed on December 2, 1999. The Order to Show Cause secured by Petitioner from the Circuit Court did not set a hearing for more than two months after the Complaint was filed,

an unusually long time frame for a hearing to show cause. Petitioner had more than ample time to pursue discovery that would have been due prior to the hearing date, but failed to do so. Apparently as a matter of strategy, Petitioner did not actively seek the discovery now claimed to have been so critical to the Survival of Western Democracy. Rather, Petitioner merely sought show cause relief, presumably with the intent of securing a judgment in his favor on a summary basis.

Petitioner had the opportunity to pursue discovery on a schedule calculated to produce the fruits of such discovery in time for use at the show cause hearing, but failed to do so. Petitioner waited until **approximately nine days before the hearing** to even **begin** to seek discovery, obviously knowing that responses could not possibly be available by the hearing date. As noted *supra*, the Michigan Court Rules of 1985 generally allow parties 28 days to respond to discovery requests. **Petitioner never asked the Circuit Court for discovery on an expedited basis.** It would be a travesty of the judicial process to allow Petitioner to use his own failed strategy as a basis for pursuing an appeal to the nation's highest court.

The Michigan Court Rules of 1985 provide that discovery is broad and most matters are generally discoverable. MCR 2.302(B)(1), however, states:

> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is **relevant** to the subject matter involved in the pending action . . . . [Emphasis added.]

In addition to Petitioner's request being dilatory, the matters on which Petitioner sought discovery were not

"relevant to the subject matter involved in the pending action", in view of the Circuit Court's determination as to how Michigan statutes applied to the case. That is, based upon the Circuit Court's finding that Respondent had complied with applicable Michigan election law on absentee ballots, and that absentee ballots received **after** the close of polls (as pleaded) should **not** be counted, the production of absentee ballots received by respondent **after** the end of voting on November 2, 1999 would have served no relevant purpose.

In his Petition, Petitioner presents an unsupported (and unsupportable) argument that discovery is somehow necessary to keep the election system honest, referencing various political activities that have absolutely nothing to do with this case. The very idea that there was a vast conspiracy preventing absentee ballots from being counted in a mundane municipal election is ridiculous on its face.

All absentee ballots were opened and counted in the presence of several inspectors. No one, besides Petitioner, has even suggested there was anything wrong with the counting process. Petitioner's personal knowledge is restricted to finding some absentee ballots the day after the election. Petitioner had and has no idea when those ballots, assuming *arguendo* they would otherwise be valid, were delivered to Respondent's office. Petitioner did absolutely nothing to develop any evidence as to when those ballots were delivered to Respondent's office. If they were delivered to Respondent's office after close of voting on November 2, 1999, there is no way they could ever have been lawfully counted. Petitioner never came forward with anything that indicated the ballots

were delivered prior to the close of voting. Respondent, of course, presented Affidavits that indicated that all absentee ballots received by close of voting on election day had been counted. It was Petitioner's duty to come forward with something that created a material issue of fact as to whether all absentee ballots received by Respondent's office before the close of voting had been counted if he wished to avoid the summary dismissal of his case. He did not do so, and he has no one but himself to blame for the collapse of his case.

The Circuit Court ruled as a matter of law on the issues alleged in Petitioner's Complaint. The Circuit Court held that absentee ballots must reach Respondent's office, not merely the Post Office, prior to the close of polls on election day in order to be counted (MCL 168.764a). The Circuit Court further held that Respondent had met her duty under MCL 168.765(3) by receiving absentee ballots in the mail on election day. The Michigan Court of Appeals affirmed the Circuit Court on these legal issues and the Michigan Supreme Court declined to review the decision of the Court of Appeals (and, by inference, the decision of the Circuit Court).

There was no allegation in the Complaint that any of the uncounted absentee ballots had actually reached Respondent's office prior to the close of polls on election day. Thus, there was no relevant purpose to be served by producing subsequently received absentee ballots. Although the Michigan Court Rules permit the liberal amendment of pleadings, Petitioner never sought to amend his Complaint to add new theories.

Within the context of the claims set forth in Petitioner's pleadings, found to be devoid of merit in the Circuit Court and the Michigan Court of Appeals, Petitioner has failed to demonstrate any prejudice that resulted from the denial of access to the uncounted absentee ballots. Thus, the discovery sought by Petitioner was not relevant, Petitioner's federal constitutional rights were not compromised in any way, and no useful purpose would be served by granting Petitioner's Petition for a Writ of *Certiorari*.

Petitions for Writs of *Certiorari* are supposed to present matters involving substantial federal questions. If they do not, they should be denied forthwith and without the need for detailed explanation. See, generally, *Jones* v. *Louisiana*, 392 U.S. 302, 88 S. Ct. 2055, 20 L. Ed. 2d 1107 (1968), *reh den*; see also *White* v. *Anson*, 350 U.S. 908, 76 S. Ct. 194, 100 L. Ed. 797 (1955). What is at issue here is a minor, noncontroversial point of state election law – absentee ballots, to be counted, must be received by the appropriate election official before the close of voting on the designated election day. Petitioner himself concedes the law is valid, and that it does not violate either federal law or the United States Constitution. Petitioner has, for lack of a better term, hijacked his own cause of action and attempted to convert it into something akin to a cross between the movies *Braveheart* and *Conspiracy Theory*, with unsubstantiated claims of when absentee ballots arrived, hundreds and hundreds of absentee ballots unaccounted for and so on.

At some point, litigation must end. The instant case is one that should never have been filed, much less taken from a Michigan Circuit Court to the Michigan Court of

Appeals, then to the Michigan Supreme Court and finally to this forum. This matter should be ended with the denial of Petitioner's Petition.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, Respondent respectfully requests that this Honorable United States Supreme Court enter an Order denying Petitioner's Petition for a Writ of Certiorari in the above-entitled cause of action.

MICHAEL L. UPDIKE
Counsel of Record for Respondent

SECREST, WARDLE, LYNCH, HAMPTON, TRUEX AND MORLEY
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, Michigan
48333-3040
(248) 851-9500

Dated: November 14, 2001

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EXHIBIT A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SIDNEY LANTZ,
Plaintiff

Vrs.

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,
Defendant

_____/

Stephen P. Korn P-30913
Attorney for Plaintiff
30800 Van Dyke Suite 206
Warren, Michigan 48093
810-751-1696

_____/

COMPLAINT

NOW COMES, Sidney Lantz, Plaintiff, and through his attorney, Stephen P. Korn, and complains of Defendant, as follows:

1. That the Plaintiff is a resident of the City of Southfield, County of Oakland, State [sic] Michigan.

2. That the Defendant is the duly elected Clerk for the City of Southfield.

3. That on November 2, 1999, the predecessor Clerk for the City of Southfield, Susan Rydell, conducted an election, which included the race for the Southfield City Council.

4. That pursuant to the rules of the election, those candidates receiving the top three vote totals would be elected to a four year term.

5. That pursuant to rules of the election, the candidate who would receive the fourth vote total would be elected to a two year term.

6. That according to election returns, the difference in vote totals between third and fourth place was seventy (70) votes.

7. That over one hundred eighty (180) absentee ballots postmarked before the close of the election were not counted.

8. That many more absentee ballots have not been accounted for.

9. That the integrity of the election of November 2, 1999 has been compromised.

Quo Warranto

10. That allegations one through nine be incorporated by reference.

11. That the failure to count all of the absentee ballots which were postmarked prior to the close of the election polls on November 2, 1999 is material and could impact the outcome of the Southfield City Council Election.

12. That the failure to account for outstanding absentee ballots which were postmarked prior to the close of the election polls on November 2, 1999 is material and could impact the outcome of the Southfield City Council Election.

13. That the Southfield City Clerk should be compelled by Order of this Court to produce all ballots not

counted on November 2, 1999, and particularly, all absentee ballots not counted on November 2, 1999.

14. That the Southfield City Clerk should be compelled by Order of this Court to count all absentee ballots, which were, postmarked before the close of the election polls on November 2, 1999.

15. That the Southfield City Clerk should be compelled by Order of this Court to amend its election results consistent with the counting of all ballots as determined by order of the Court.

16. That an Order to Show Cause should issue from this Court compelling the Clerk for the City of Southfield to appear and show cause why:

    A. The Southfield City Clerk should not be compelled by Order of this Court to produce all ballots not counted on November 2, 1999, and particularly, all absentee ballots not counted on November 2, 1999.

    B. The Southfield City Clerk should not be compelled by Order of this Court to count all absentee ballots, which were postmarked before the close of the election polls on November 2, 1999.

    C. The Southfield City Clerk should not be compelled by Order of this Court to amend its election results consistent with the counting of all ballots as determined by order of the Court.

    D. A Writ Quo Warranto should not issue from this Court to address the failure of the Southfield City Clerk to count Absentee Ballots, which were postmarked before the close of the polls, November 2, 1999.,

17. That special leave to bring this Quo Warranto action be granted pursuant to MCR 3.306(B)(2) and pursuant to MCLA sec.600.4545(2). (See Affidavit of Stephen P. Korn).

WHEREFORE, Plaintiff, Sidney Lantz, prays:

A. That the Southfield City Clerk should be compelled by Order of this Court to produce all ballots not counted on November 2, 1999, and particularly, all absentee ballots not counted on November 2, 1999.

B. That the Southfield City Clerk should be compelled by Order of this Court to count all absentee ballots which were postmarked before the close of the election polls on November 2, 1999.

C. That the Southfield City Clerk should be compelled by Order of this Court to amend its election results consistent with the counting of all ballots as determined by order of the Court.

D. That a Writ Quo Warranto issue from this Court to address the failure of the Southfield City Clerk to count Absentee Ballots which were postmarked before the close of the polls, November 2, 1999.

E. That an Order to Show Cause issue from this Court compelling the Clerk for the City of Southfield to appear for the reasons set forth above.

F. That special leave be granted by the Court to bring this quo Warranto action, pursuant to statute and court rule.

Mandamus

18. That allegations one through seventeen be incorporated by reference.

19. That Article II, section 4 of the Michigan Constitution provides the authority for the "purity of elections" and for "absentee ballot."

20. That MCLA sec. 168.764a sets forth "Instructions for Absent Voters" which shall be included with each ballot or set of ballots furnished an absent voter.

21. That MCLA sec. 168.764a, Step 5, provides the following:

> "Step 5. Deliver the return envelope by 1 of the following methods:
>
> a) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.
>
> b) Deliver the envelope personally to the office of the clerk, to the clerk, or to an authorized assistant of the clerk.
>
> c) In either (a) or (b), a member of the immediate family of the voter, including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or a person residing in the voter's household may mail or deliver a ballot to the clerk for the voter.
>
> d) *You* may request by telephone that the clerk who issued the ballot provide assistance in returning the ballot. *The clerk is required to provide assistance if you are unable to return your absent voter ballot as specified in (a), (b),*

or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pick up the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered. Your absent voter ballot will then be picked up by the clerk or an election assistant sent by the clerk. All persons authorized to pick up absent voter ballots are required to carry credentials issued by the clerk. If using this absent voter ballot return method, do not give your ballot to anyone until you have checked their credentials.

22. That MCLA sec. 168.765(3) provides the following:

> "(3) *The city, village, or township clerk, or authorized designee of the clerk shall call for and receive absent voter ballots from the post office at which the city, village, or township clerk regularly receives mail addressed to the city, village, or township clerk on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls."*

23. That the Clerk for the City of Southfield failed in its duty to call for and receive absent voter ballots from the Southfield Post Office which is located less than one mile from City Hall *in sufficient time to deliver* more than one hundred eighty ballots to the board of election inspectors before the close of the polls.

24. That many senior citizens, disabled citizens, and those otherwise entitled to request an absentee ballot, pursuant to MCLA section MCLA sec. 168.759 have been disenfranchised through the actions of the Southfield City Clerk in failing to call for and receive absent voter ballots from the Southfield Post

Office which is located less than one mile from City Hall ***in sufficient time to deliver*** such ballots to the board of election inspectors before the close of the polls.

25. That although MCLA sec. 168.764a, Step 6, provides the following:

> "Step 6. The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An Absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted."

MCLA sec. 168.764a, Step 5, provides the following:

> "Step 5. Deliver the return envelope by 1 of the following methods:
>
> e) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier."

as a statutory method for a person, qualified to vote by absentee ballot to participate in the elective process.

26. That pursuant to MCLA sec. 168.765(3), the Southfield City Clerk should be compelled to count all absentee ballots post marked before the close of the polls on election day, November 2, 1999, which were otherwise in proper form to be counted, in compliance with the election law.

27. That the Southfield City Clerk should be compelled to account for all absentee ballots and all other ballots, which were received by the Clerk, and otherwise not counted in the election of November 2, 1999.

28. That the Southfield City Clerk should be compelled to report the election results in accordance with the rulings of this Court.

29. That an Order to Show Cause issue from this Court compelling the Clerk for the City of Southfield to appear and show cause why a Writ of Mandamus should not issue, and why the Plaintiff, Sidney Lantz, should not be entitled to the following relief:

    A. That the Southfield City Clerk should be compelled by Order of this Court to produce all ballots not counted on November 2, 1999, and particularly, all absentee ballots not counted on November 2, 1999.

    B. That the Southfield City Clerk should be compelled by Order of this Court to count all absentee ballots which were postmarked before the close of the election polls on November 2, 1999.

    C. That the Southfield City Clerk should be compelled by Order of this Court to amend its election results consistent with the counting of all ballots as determined by order of the Court.

    D. That a Writ of mandamus issue from this Court to address the failure of the Southfield City Clerk to count Absentee Ballots which were postmarked before the close of the polls, November 2, 1999.

WHEREFORE, Plaintiff, Sidney Lantz, prays:

A. That the Southfield City Clerk should be compelled by Order of this Court to produce all ballots not counted on November 2, 1999, and particularly, all absentee ballots not counted on November 2, 1999.

B. That the Southfield City Clerk should be compelled by Order of this Court to count all absentee ballots which were postmarked before the close of the election polls on November 2, 1999,.

C. That the Southfield City Clerk should be compelled by Order of this Court to amend its election results consistent with the counting of all ballots as determined by order of the Court.

D. That a Writ of Mandamus issue from this Court to address the failure of the Southfield City Clerk to count Absentee Ballots which were postmarked before the close of the polls, November 2, 1999.

E. That an Order to Show Cause issue from this Court compelling the Clerk for the City of Southfield to appear for the reasons set forth in the Complaint.

I declare that the above statements are true to the best of my knowledge, information, and belief.

/s/ Sidney Lantz
Sidney Lantz

/s/ Stephen P. Korn
Stephen P. Korn P-30913
Attorney for Plaintiff

November 29, 1999

EXHIBIT B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

SIDNEY LANTZ,

Plaintiff,

-v-

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,

Defendant.
_____/

Case No. 1999-019368-AW
Honorable
Nanci J. Grant

Stephen P. Korn (P30913)
Attorney for Plaintiff
30800 Van Dyke, Suite 206
Warren, MI 48093

Gerald A. Fisher (P13462)
Attorney for Defendant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040

OPINION AND ORDER

At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 18th day of February, 2000.

PRESENT: *HONORABLE*
NANCI J. GRANT, CIRCUIT JUDGE

This matter, having come before the Court on Plaintiff's motion for production of documents, said motion is DENIED and the action is DISMISSED.

The following facts are undisputed. On November 2, 1999, the predecessor Clerk for the City of Southfield City Counsel conducted an election, which included the race for Southfield City Council. At approximately 8:00 a.m. on November 2, 1999, the United States Post Office delivered to the City Clerk all absentee ballots received by that time. The Post office made no other deliveries of absentee ballots that day, nor did the City Clerk contact the post office to inquire into whether additional ballots had arrived.

The City Council election was close, with only a 70-vote difference between third and fourth place. Plaintiff then discovered that the City had received at least 180 absentee ballots after the polls closed, which were not counted in the election. Moreover, those ballots were postmarked on November 2, 1999. Thus, Plaintiff filed suit to challenge the election, arguing that the absentee ballots postmarked on election day should have been counted in the election.

In this motion, Plaintiff seeks an order compelling production and/or copying of all absentee ballots and ballot jackets. In response, Defendants assert not only that the motion should be denied, but also that Plaintiff's claim should be dismissed in its entirety.

In considering this motion, the Court must first address the legal theories under which Plaintiff brings his

claim. In support of its application for action quo warranto, Plaintiff asserts that an absentee ballot must be counted so long as it is postmarked on the date of the election, regardless of where that post mark originated or whether the ballot was received by the Clerk before the poles close. The Court disagrees. The absentee ballot provisions of Michigan election law, MCL 168.758 – 168.769a, provide a detailed description of the procedures for absentee voting, and do not contain such a provision regarding postmarks. In fact, MCL 168,764a explicitly provides: "The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day" and "an absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted." In this context, the Court finds Plaintiff's interpretation to be untenable. Rather, the postmark is irrelevant, and an absentee ballot must be counted only if it reaches the clerk before the close of polls on election day.

Plaintiff also argues that the Clerk did not comply with MCL 168.765. Specifically, subsection (3) requires the City Clerk to "call for and receive absent voter ballots from the post office . . . on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls." Plaintiff claims that the City Clerk did not comply with this subsection because she did not take any steps to receive absentee ballots from the post office after receiving the 8:00 am mail delivery on election day. The Court disagrees. Specifically, the Court finds that the Clerk satisfies his or her obligations under the statute by accepting

the Post Office's regularly scheduled election day mail delivery.

In light of the foregoing, the Court sees no way that Plaintiff can prevail even if absentee ballots were delivered to the post office on November 2, 1999, after the 8:00 am mail delivery to the City. Therefore, Plaintiff's current motion is denied, and the action is dismissed.

/s/ Nanci J. Grant
NANCI J. GRANT,
Circuit Judge

A TRUE COPY
C. WILLIAM CADDELL
Oakland County Clerk -
Register of Deeds

By /s/ [Illegible]
Deputy

EXHIBIT C

M.C.L.A. 168.764a

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 168, MICHIGAN ELECTION LAW
MICHIGAN ELECTION LAW
CHAPTER XXVIII, HOLDING OF ELECTIONS
ABSENT VOTERS

168.764a. Instructions for absent voters

sec. 764a. The following instructions for an absent voter shall be included with each ballot or set of ballots furnished an absent voter:

INSTRUCTIONS FOR ABSENT VOTERS

Step 1. On the absent voter ballot enclosed you will find voting instructions. Read these carefully and then vote the ballot.

Step 2. After voting a ballot, place the ballot in the secrecy sleeve, if any, if a secrecy sleeve is not provided, refold the ballot to conceal your votes.

Step 3. Place the ballot or ballots in the return envelope and securely seal the envelope.

Step 4. Sign and date the return envelope in the place designated. Your signature must appear on the return envelope or the ballot will not be counted. If you are disabled or otherwise unable to mark the ballot and required assistance in voting your absent voter ballot, have the person who assisted you complete the section on the return envelope entitled "TO BE COMPLETED ONLY IF VOTER IS ASSISTED IN VOTING BY ANOTHER PERSON".

Step 5. Deliver the return envelope by 1 of the following methods:

(a) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.

(b) Deliver the envelope personally to the office of the clerk, to the clerk, or to an authorized assistant of the clerk.

(c) In either (a) or (b), a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or a person residing in the voter's household may mail or deliver a ballot to the clerk for the voter.

(d) You may request by telephone that the clerk who issued the ballot provide assistance in returning the ballot. The clerk is required to provide assistance if you are unable to return your absent voter ballot as specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pick up the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered. Your absent voter ballot will then be picked up by the clerk or an election assistant sent by the clerk. All persons authorized to pick up absent voter ballots are required to carry credentials issued by the clerk. If using this absent voter ballot return method, do not give your ballot to anyone until you have checked their credentials.

Step 6. The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted.

WARNING

All of the following actions are violations of the Michigan election law and are illegal in this state:

(1) To vote an absent voter ballot at a meeting or gathering at which other people are voting absent voter ballots.

(2) For a person who is assisting an absent voter in marking the ballot to suggest or in any manner attempt to influence the absent voter on how he or she should vote.

(3) For a person who is present and knows that a person is voting an absent voter ballot to suggest or in any manner attempt to influence the absent voter on how he or she should vote.

(4) For a person other than those listed in these instructions to return, offer to return, agree to return, or solicit to return an absent voter ballot to the clerk.

(5) For a person other than the absent voter; a person listed in these instructions; or a person whose job it is to handle mail before, during, or after being transported by a public postal service, express mail service, parcel post service, or common carrier, but only during the normal course of his or her employment to be in possession of a voted or unvoted absent voter ballot.

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

SIDNEY LANTZ,

PLAINTIFF,

v.

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,

DEFENDANT.

_____/

CASE NO.
99-019368-AW

HONORABLE
NANCI J. GRANT

Stephen P. Korn (P30913)
Attorney for Plaintiff
30800 Van Dyke, Suite 206
Warren, MI 48093
(810) 751-1696

Gerald A. Fisher (P13462)
Attorney for Defendant
SECREST, WARDLE, LYNCH,
HAMPTON, TRUEX AND MORLEY
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

AFFIDAVIT OF THEODORE B. BANKS, POSTMASTER

THEODORE B. BANKS, being first duly sworn, deposes and states that he is of suitable age and discretion to make this Affidavit, and if sworn as a witness in the above-referenced case, would state the following:

1. Affiant is the Postmaster of the Southfield, Michigan Post Office (the "Post Office").

2. At the Post Office, on days on which there is mail delivery, there are three times during the day that mail may become available for pick-up or delivery prior to 8:00 p.m.:

   a. Two morning deliveries (5:30 a.m. and 7:30 a.m.) which together result in the principal source of mail that is prepared for pick-up and delivery after 7:30 a.m.; and

   b. A secondary delivery time, when a much smaller quantity of mail (and typically no first class mail) may become available for pick-up at 1:30 p.m.

3. The City of Southfield ("City") has arranged with the Post Office to pick up the City's mail, and, on days on which there is mail delivery, a representative of the City picks-up the City's mail at approximately 8:00 a.m.

4. Affiant is certain that the City picked-up its mail delivery on the morning of November 2, 1999.

5. Affiant had directed, Michael Darling, Supervisor of Customer Service, who is in charge of mail processing, to advise Affiant if any first class mail, which would have

included absentee ballots, was available for pick-up in connection with the 1:30 p.m. delivery time on November 2, 1999, and, Affiant is extremely confident that Mr. Darling would have advised Affiant if any such ballots existed.

6. Mr. Darling did not advise Affiant that any first class mail or ballots were available in connection with the 1:30 p.m. delivery time on November 2, 1999.

7. Consistent with past practice, if there had been any ballots available in connection with the 1:30 p.m. delivery time on November 2, 1999, the Post Office would have called the City to ascertain where they should be delivered, and the Post Office would have delivered them to the City.

8. In conclusion, as the Postmaster of the Post Office, I can say with reasonable certainty that, on November 2, 1999, the City received all of the absentee ballot envelopes that were available in the Post Office for delivery prior to 8:00 p.m. on such day, and, correspondingly, if the City Clerk had called the Post Office on November 2, 1999 after the 8:00 a.m. pick-up by the City, and prior to 8:00 p.m., there would not have been any absentee ballots for the City to pick-up or otherwise receive.

/s/ Theodore B. Banks
THEODORE B. BANKS

SUBSCRIBED AND SWORN to
before me this 1st day of February, 2000.

/s/ Linda Sue Willimsen
Notary Public
Oakland County, Michigan
My Commission Expires: 02-08-02

GERALD A. FISHER (P13462)
Attorney for Defendant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 539-2818

EXHIBIT E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

SIDNEY LANTZ,

PLAINTIFF,

v.

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,

DEFENDANT.
_____/

CASE NO. 99-019368-AW

HONORABLE
NANCI J. GRANT

Stephen P. Korn (P30913)
Attorney for Plaintiff
30800 Van Dyke,
Suite 206
Warren, MI 48093
(810) 751-1696

Gerald A. Fisher (P13462)
Attorney for Defendant
SECRET, WARDLE,
LYNCH, HAMPTON,
TRUEX AND MORLEY
30903 Northwestern
Highway
P.O. Box 3040
Farmington Hills, MI
48333-3040
(248) 851-9500

AFFIDAVIT OF MICHAEL DARLING, SUPERVISOR

MICHAEL DARLING, being first duly sworn, deposes and states that he [sic] is of suitable age and

discretion to make this Affidavit, and if sworn as a witness in the above-referenced case, would state the following:

1. Affiant is the, Supervisor of Customer Service, and is in charge of mail processing at the Southfield, Michigan Post Office (the "Post Office").

2. At the Post Office, on days on which there is mail delivery, there are three times during the day that mail may become available for pick-up or delivery prior to 8:00 p.m.:

   a. Two morning deliveries (5:30 a.m. and 7:30 a.m.) which together result in the principal source of mail that is prepared for pick-up and delivery after 7:30 a.m.; and

   b. A secondary delivery time, when a much smaller quantity of mail (and typically no first class mail) may become available for pick-up at 1:30 p.m.

3. On November 2, 1999, in view of the fact that it was the day of an election, Affiant received a direction from Postmaster Theodore B. Banks to advise him (Mr. Banks) if any first class mail, which would have included absentee ballots, was available for pick-up in connection with the 1:30 p.m. delivery time on such day.

4. Affiant checked to determine whether any first class mail, which would have included absentee ballots, was available in connection with the 1:30 p.m. delivery time on November 2, 1999.

5. Because no first class mail, which would have included absentee ballots, was available in connection with the 1:30 p.m. delivery time on November 2, 1999, Affiant did not advise Mr.

Banks, the Postmaster that there was mail, including

6. ballots, to be picked-up or delivered.

/s/ Michael Darling
MICHAEL DARLING

SUBSCRIBED AND SWORN to
before me this 1st day of February, 2000.

/s/ Linda Sue Willimsen
Notary Public
Oakland County, Michigan
My Commission Expires: 02-08-02

GERALD A. FISHER (P13462)
Attorney for Defendant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 539-2818

EXHIBIT F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

SIDNEY LANTZ,

PLAINTIFF,

v.

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,

DEFENDANT.
_____/

CASE NO. 99-019368-AW

HONORABLE
NANCI J. GRANT

Stephen P. Korn (P30913)
Attorney for Plaintiff
30800 Van Dyke, Suite 206
Warren, MI 48093
(810) 751-1696

Gerald A. Fisher (P13462)
Attorney for Defendant
SECRET, WARDLE,
LYNCH, HAMPTON,
TRUEX AND MORLEY
30903 Northwestern
Highway
P.O. Box 3040
Farmington Hills, MI
48333-3040
(248) 851-9500

AFFIDAVIT OF SUSAN RYDELL, DEPUTY CLERK

SUSAN RYDELL, being first duly sworn, deposes and states that he is of suitable age and discretion to make this Affidavit, and if sworn as a witness in the above-referenced case, would state the following:

1. Affiant is the Deputy Clerk for the City of Southfield, Michigan ("City").

2. On November 2, 1999, Affiant was serving as the Clerk for the City.

3. On November 2, 1999, the City Clerk's office received a mail delivery which included a delivery of absentee ballots. Such delivery was received at approximately 8:30 a.m.

4. I have reviewed the statement of Theodore B. Banks in an Affidavit signed in connection with the above case, to the effect that, "Consistent with past practice, if there had been any ballots available in connection with the 1:30 p.m. delivery time on November 2, 1999, the Post Office would have called the City to ascertain where they should be delivered, and the Post Office would have delivered them to the City". (¶ 7) This statement is consistent with Affiant's recollection and experience in the City Clerk's office on election days in past years. If there were additional absentee ballots at the Post Office in the afternoon, a Post Office representative would call and deliver such ballots to the City.

/s/ Susan H. Rydell
SUSAN RYDELL

SUBSCRIBED AND SWORN to
before me this 31st day of January, 2000.

/s/ Bonnie A. Ruffins
Notary Public Wayne County [illegible]
Oakland County, Michigan
My Commission Expires: 9-21-02

BONNIE A. RUFFINS
Notary Public,
Wayne County, MI
My Commission Expires
Sept. 21, 2002
Acting in Oakland County, MI

GERALD A. FISHER (P13462)
Attorney for Defendant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 539-2818

EXHIBIT G

STATE OF MICHIGAN

COURT OF APPEALS

SIDNEY LANTZ,

Plaintiff-Appellee,

v

NANCY BANKS, In her official capacity as CLERK OF THE CITY OF SOUTHFIELD

Defendant-Appellant.

FOR PUBLICATION
May 8, 2001
9:00 a.m.

No. 225531
Oakland County
Circuit Court
LC No.
99-019368-AW

Before: Hood, P.J., and Doctoroff, and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order summarily dismissing[1] his challenge to the November 2, 1999, election for Southfield City Council and the trial court's denial of his motion for production of certain absentee ballots. We affirm.

---

[1] The order dismissing plaintiff's complaint, does not indicate whether it was decided pursuant to MCR 2.116(C)(10) (no genuine issue as to any material fact) or MCR 2.116(C)(8) (failure to state a claim). Because the trial court considered documentary evidence submitted beyond the pleadings, we surmise that the trial court dismissed plaintiff's claim on the authority of MCR 2.116(C)(10). We review the trial court's decision accordingly.

I. Basic Statement of Facts and Procedural History

On November 2, 1999, an election was conducted for the Southfield City Council. According to the rules of the election, there would be four candidates elected to office. The three candidates receiving the highest number of votes would be elected to serve four-year terms and the fourth candidate would serve a two-year term. Plaintiff finished fourth, receiving seventy fewer votes than the third-place finisher. As such, plaintiff was elected to serve for two years.

Plaintiff filed a complaint alleging that 180 absentee ballots postmarked before the close of the election were not counted, that additional ballots were unaccounted for, and, the integrity of the electoral process was thereby compromised. Plaintiff further alleged that defendant failed to "call for and receive" absentee ballots from the Southfield Post Office in time to deliver them to the board of election inspectors before the polls closed on election day in violation of MCL 168.765(3); MSA 6.1765(3). Plaintiff sought a writ quo warranto and mandamus compelling defendant to produce all uncounted ballots (particularly the absentee ballots), count all ballots postmarked before the close of the polls on election day, and amend the election results accordingly.

The trial court granted plaintiff special leave to bring his action quo warranto. In addition, the trial court ordered defendant to show cause why she should not be compelled to produce all ballots not counted on election day, count all absentee ballots postmarked on or before election day, and amend the election results in accord with the new count.

At the show cause hearing, defendant submitted three separate affidavits establishing that on election day: (1) a representative from the city of Southfield picked up the mail, which included absentee ballots, from the Southfield Post Office at approximately 8:00 a.m.[2]; (2) the deputy clerk received the ballots from this mail run at approximately 8:30 a.m. (3) the postmaster directed the supervisor in charge of mail processing in Southfield to advise the postmaster if any ballots or first-class mail were available from the 1:30 p.m. delivery; (4) no absentee ballots were available from the 1:30 p.m. delivery time; and (5) even if the Southfield City Clerk telephoned the post office between the 8:00 a.m. post office pick-up and before the polls closed, there would not have been any absentee ballots for the ~~city to~~ receive. The plaintiff did not contest the statements contained in these sworn affidavits, instead arguing that the postmark controlled the absentee ballots' eligibility to be counted. The trial court held that the receipt by the clerk of the actual ballot, rather than the postmark, controlled, and dismissed plaintiff's complaint in its entirety.

---

[2] The affidavits also established that ballots are delivered via first-class mail. At the Southfield Post Office, mail is delivered three times during the day: 5:30 a.m., 7:30 a.m. and 1:30 p.m. The morning deliveries account for the principal source of first-class mail prepared for pick-up. The afternoon delivery is much smaller and typically does not include any first-class mailings.

II. Standard of Review

A trial court's grant or denial of summary dismissal is reviewed de novo by this Court. *Cork v Applebee's of Michigan, Inc.*, 239 Mich App 311, 315; 608 NW2d 62 (2000). When reviewing a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must consider the lower court record, including all pleadings, affidavits, depositions, admissions, and other documentary evidence submitted, in a light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 75-76; 597 NW2d 517 (1999). Pursuant to the dictates of MCR 2.116(C)(10), where the evidence establishes that there is no genuine issue concerning any material fact, the moving party is entitled to judgment as a matter of law, and the trial court may summarily dismiss the plaintiff's cause of action. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

III. Plaintiff's Contentions

A. Ballots Postmarked On or Before Election Day

Plaintiff first contends that any ballot postmarked on or before the close of the polls on election day must be counted and defendant's failure to do so rendered the election invalid. Plaintiff's position is without merit.

The absentee ballot provisions of Michigan election law are specific. MCL 168.764b(1); MSA 6.176(2)(1) provides that "an absent voter ballot shall be delivered to the clerk only as authorized in the instructions for an absent voter provided in Section 764a." MCL 168.764a, MSA 6.1764(2) provides in relevant part:

> The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day. *An absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted.* [Emphasis added.]

The clear language of these statutes indicate that actual receipt of an absentee ballot is paramount. To "receive" the absent voter ballots presupposes that they are physically in the possession of the clerk or an authorized assistant. If an absentee voter ballot does not reach either of these individuals before the close of the polls on election day, they cannot be counted irrespective of the date displayed in the postmark. By suggesting that the date contained in the postmark should govern, plaintiff ignores the plain language of the statute and attempts to create an ambiguity where none exists. The statute at issue is clear and unequivocal thus, "[l]eav[ing] no room for judicial construction." *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999) (citation omitted). The role of the judiciary is to apply the terms of the statute as enacted by the Legislature lest "[a] court . . . impermissibly substitute[ ] its own policy preferences." *Id.*

In the case at bar, the uncontroverted evidence established that on November 2, 1999, after a representative from the city picked up the regular morning mail, there were no additional ballots to pick up before polls closed at 8:00 p.m. The evidence further established that if the post office had received additional ballots after the regular morning pick-up, the postmaster would have phoned the city clerk and made arrangements to deliver the ballots received. Accordingly, the evidence established that

defendant received all the ballots from the post office on election day. Plaintiff conceded these facts. When presented with documentary evidence, plaintiff is not entitled to rely on the bald allegations in the pleadings alone but, rather, must come forth with some documentary evidence to demonstrate a genuine factual issue for the court to resolve.[3] Plaintiff failed to do so. Because plaintiff does not claim that the city clerk failed to "deliver" the absentee ballots "received" from the post office to the election inspectors before the polls closed, there is no genuine issue concerning any material fact and summary disposition in favor of defendant was therefore warranted.[4] The statutes specifically provide a deadline for

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[3] See *Michigan State AFL-CIO v Civil Service Comm*, 191 Mich App 535; 478 NW2d 722 (1991) (stating that a motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim and dismissal is appropriate where the party opposing the motion "rest[s] upon the mere allegations or denials in [the] pleadings"). In the case at bar, the February 9, 1999, hearing was not a motion for summary disposition brought by defendant, but was rather a show cause hearing regarding plaintiff's complaint. Nevertheless, plaintiff is still required to demonstrate a genuine factual dispute justifying a trial.

[4] Plaintiff states that "[i]n the absence of discovery Plaintiff believes that . . . [all of the ballots in dispute] are "[i]n the hands of the Southfield City Clerk, and were in the hands of the Southfield City Clerk on and before the close of the polls. . . . " Plaintiff did not make this allegation during the hearing on February 9, 1999, but instead raises it for the first time on appeal. Issues raised for the first time on appeal are not properly preserved and, thus, "[n]ot subject to review" save for "exceptional circumstances." On the record here before us, we do not discern any "extraordinary circumstances" requiring us to abandon this cardinal rule. See *Booth Newspapers, Inc. v University of Michigan Bd of Regents*, 444 Mich 211, 234, n23; 507

absentee ballots based on the physical receipt of the ballots. The trial court correctly determined that a postmark, standing alone, is irrelevant and that only those ballots in defendant's possession before the close of the polls were eligible to be counted.

B. The Requirement to "Call For and Receive" Ballots

MCL 168.765(3); MSA 6.1766 states in relevant part:

> [t]he city . . . clerk, or authorized designee of the clerk *shall call for and receive absent voter ballots from the post office* at which the city . . . clerk regularly receives mail addressed to the city . . . on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls. [emphasis added.]

Plaintiff argues that the defendant had an affirmative duty to "call for and receive" absent voter ballots from the post office in sufficient time to deliver them to the board of election inspectors before the polls closed and that she failed to do so. Although defendant did not "call for" absentee voter ballots from the post office, the uncontested evidence adduced at the hearing established that after the 8:00 a.m. morning mail pick-up, no other absentee ballots came into the post office for delivery to the city clerk. Moreover, the evidence established that if indeed absentee voter ballots were received at the post

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NW2d 422 (1993) (noting that the Court "[h]as repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims").

office by virtue of the afternoon mail delivery on November 2, 1999, the post office would have called the city to "[a]scertain where [the ballots] should be delivered." The defendant's failure to "call for" the absentee ballots is inapposite because the evidence presented definitively established that there were no ballots to deliver. Accordingly, there was no genuine, material factual issue precluding summary disposition.

C. Production of Ballots

Plaintiff finally argues that the trial court erred when it denied plaintiff's motion for production of all absentee ballots. From the City of Southfield Election of November 2, 1999 for Inspection. A trial court's decision to deny discovery will not be overturned absent an abuse of discretion. *Baker v Oakwood Hospital Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

In the case at bar, the trial court did not abuse its discretion by denying plaintiff's discovery requests. Plaintiff does not allege or otherwise argue that the uncounted absentee ballots requested actually reached the city clerk's office before the polls closed on election day but were not delivered to the board of election inspectors for counting. In fact, plaintiff submits that absentee ballots postmarked on or before November 2, 1999, should be counted regardless of when the city clerk actually receives them. Plaintiff's position flies in the face of the clear and unambiguous language employed in the statutes and the uncontested facts adduced at the February 9, 1999, hearing. The information sought by plaintiff in discovery is not even marginally relevant considering

the applicable law discussed herein. Accordingly, the trial court did not commit error requiring reversal by denying plaintiff's request for discovery.

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly

Order
Entered: August 28, 2001

Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

119260
& (51)
(56)

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SIDNEY LANTZ,

Plaintiff-Appellant,

v

SOUTHFIELD CITY CLERK,

Defendant-Appellee.

SC: 119260
COA: 225531
Oakland CC:
99-019368-AW

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal from the May 8, 2001, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to strike is also considered, and it is DENIED as moot.

f0821

[SEAL] I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 28, 2001 /s/ Corbin R. Davis
Clerk

EXHIBIT H

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

SIDNEY LANTZ,
Plaintiff

Vrs. Case No. 99-019368-AW

NANCY BANKS, IN HER OFFICIAL
CAPACITY AS CLERK FOR THE
CITY OF SOUTHFIELD,
Defendant.

_____/

Stephen P. Korn P-30913
Attorney for Plaintiff
30800 Van Dyke Suite 206
Warren, Michigan 48093
810-751-1696

_____/

ORDER TO SHOW CAUSE

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan;
On: DEC 06 1999/

Present: Honorable NANCI J. GRANT
CIRCUIT JUDGE/
Circuit Judge

This matter having come on for hearing Ex-Parte on the Complaint of Plaintiff requesting an Order to Show Cause, and the Court having reviewed the Complaint of

Plaintiff, and Brief in Support, and the Court being duly advised in the premises;

It is hereby ordered that the Clerk for the City of Southfield shall appear before this Court on the 9th day of February, 2000, at 10:00 o'clock in the A.M. noon, and show cause why the Southfield City Clerk should not be compelled by Order of the Court to:

A. produce all ballots not counted on November 2, 1999, and particularly, all absentee ballots not counted on November 2, 1999;

B. count all absentee ballots, which were post-marked before the close of the election polls on November 2, 1999;

C. amend its election results consistent with the counting of all ballots as determined by order of the Court;

and further why a Writ Quo Warranto and/or a Writ of Mandamus should not issue from this Court to address the failure of the Southfield City Clerk to count Absentee Ballots which were postmarked before the close of the polls, November 2, 1999.

NANCI J. GRANT
CIRCUIT JUDGE
Circuit Judge

A TRUE COPY
G. WILLIAM CADDELL
Oakland County Clerk – Register
of Deeds
By SR
Deputy